NO. 278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

JAMES P. MITCHELL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, *Petitioner*,

v.

JOSEPH T. BUDD, JR., AND FLORENCE W. BUDD, CO-PARTNERS,
DOING BUSINESS AS J. T. BUDD, JR., AND COMPANY,
Respondents.

JAMES P. MITCHELL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, *Petitioner*,

v.

KING EDWARD TOBACCO COMPANY OF FLORIDA
AND MAY TOBACCO COMPANY, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS J. T. BUDD, JR., AND COMPANY AND KING EDWARD TOBACCO COMPANY OF FLORIDA

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OPINIONS BELOW

The opinion of the District Court (RK 55, RB 145) is reported in 114 F. Supp. 365 and [illegible] W.H. Cases [illegible]

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[1] "RK" refers to pages of the record in *Mitchell v. King Edward Tobacco Company of Florida*, hereinafter called *King Edward and May Tobacco Company*; "RB" refers to pages of the record in *Mitchell v. J. T. Budd, Jr., and Company*, hereinafter called *Budd*.

and 24 Labor Cases ¶67,897. The opinion of the Court of Appeals (RK 89, RB 159) is reported in 221 F. (2d) 406 and also in 12 WH Cases 458 and 27 Labor Cases ¶69,105.

JURISDICTION

The judgments of the Court of Appeals were entered on April 15, 1955 (RK 96; RB 166). An order, extending until August 1, 1955, the time for filing a petition for a writ of certiorari, was entered by Mr. Justice Black on July 8, 1955 (*Id.*). A petition was filed on July 29, 1955 and certiorari was granted on October 17, 1955 (RK 97, RB 167). 350 U.S. 859. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

These cases arise under the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. §201 *et seq.*), hereinafter called "the Act". Pertinent provisions of the Act and pertinent administrative regulations involved are set forth in Appendix A, pp. 93-98, *infra*.

QUESTIONS PRESENTED

1. Whether the exemption from the wage and hour provisions of the Act provided by Section 13(a)(6) for "any employee employed in agriculture", as "agriculture" is defined in Section 3(f), applies to the employees of Respondent King Edward, who are engaged at its packing plant in handling and preparing for market Type 62

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[2] The District Court also wrote a supplemental opinion which is not officially reported (RK 74, RB 152; 24 Labor Cases ¶68,056).

cigar wrapper tobacco grown exclusively on its own farms within 13 miles of the plant.

2. Whether such employees (and the employees of Respondent Budd, who operates a similar packing plant for handling and preparing for market Type 62 tobacco grown by farmers within 30 miles of such plant) perform operations enumerated in the exemption from the wage and hour provisions of the Act provided by Section 13(a)(10) for "any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, . . . drying, . . . of agricultural or horticultural commodities for market. . . ."; and if they do perform such operations, whether the Court of Appeals correctly held the Administrator's definition of the term "area of production" invalid as applied to the factual situation here presented, and correctly reversed the District Court's action in granting the injunctions requested by Petitioner.[4]

3. If the Court finds that it is inappropriate on the present Record to affirm the summary judgments for the

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[3] Prior to May 24, 1950 the administration of the Act was in the hands of the Administrator of the Wage and Hour and Public Contracts Divisions. But effective on that date the administration of the Act was transferred to the Secretary of Labor by virtue of Reorganization Plan No. 6 of 1950 (15 Fed. Reg. 3174), 64 Stat. 1263, 5 U.S.C. 133 z-15. The Secretary, however, has delegated back to the Administrator almost all of his functions in the administration of the Act. 15 Fed. Reg. 3290. In view of the foregoing, references are sometimes made in this brief to administration of the Act by the Secretary, who is the Petitioner herein, and at other times to administration by the Administrator.

[4] The Court of Appeals held the "area of production" definition invalid insofar as it excluded from the "area of production" Respondents' tobacco packing plants solely because they are located in a town of over 2500 population; namely, Quincy, Florida, which has a population of approximately 6500 (RK 10, 92, 93, note 7; RB 162, 163, note 7).

Respondents entered below on the foregoing questions, whether the actions should be remanded to the District Court with instructions that they be decided only after trial of the issues.

COUNTER-STATEMENT OF THE CASE

Petitioner's statement of the case (Pet. Br., pp. 3-11) is incomplete or inaccurate in many respects. Accordingly, Respondents submit the following counter-statement:

Although the District Court and the Court of Appeals each wrote only one opinion herein, two separate actions are involved: (1) an action against King Edward and May, and (2) an action against Budd. A preliminary explanation is necessary as to the different contentions of each Respondent.

Respondent King Edward contends that the Court of Appeals correctly held that the employees engaged in its packing plant operations are exempt under the agriculture exemption in Section 13(a)(6) of the Act, and accordingly that it is unnecessary for this Court to consider whether such employees are also exempt, as the Court of Appeals further held, under the "area of production" exemption in Section 13(a)(10). Respondent King Edward further contends, however, that if this Court holds said employees not exempt under Section 13(a)(6), the Court of Appeals correctly held that such employees perform operations enumerated in Section 13(a)(10); that the Administrator's definition of "area of production" is invalid as applied to such operations; and that until a valid definition is made excluding Respondent's packing plant here involved from the "area of production", Petitioner is not entitled to an injunction against Respondent.

Respondent Budd does not claim that its packing plant employees are exempt under Section 13(a)(6), and the

Court of Appeals did not so hold. Consequently, no question is here involved as to the application of the agriculture exemption to Budd's employees. On the other hand, Respondent Budd makes the same contention as Respondent King Edward as to Section 13(a)(10).

In view of the foregoing, certain facts as to each action here will be presented separately, in addition to background facts common to both actions.

1. *King Edward*

King Edward's business consists of planting, raising and harvesting cigar wrapper leaf tobacco on farms which it operates in Gadsden County, Florida, and of handling and preparing such tobacco for market at its packing plant in Quincy, Gadsden County, Florida (RK 4, 48-49), a town with a population of some 6500 (RK 10, 92).

King Edward's farms have an aggregate acreage of approximately 3800 acres, including woodland, cultivated and uncultivated lands and pasture. 892 acres are under cultivation, and of these, 206 acres are devoted to the planting, cultivating, growing and harvesting of United States type No. 62 cigar wrapper leaf tobacco (RK 84A,[6] 86, 92; see also RK 48-49). This type of tobacco is grown only in three counties in Florida and in two counties in Georgia adjoining two of those in Florida, and nowhere else in the world (RK 49, 55-56, 91). See map reproduced opposite page 76, published by the United States Department of Agriculture in 1954.

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[5] King Edward does not own but rather leases its farms and packing plant facilities from an affiliated company. King Edward also operates two other packing plants which are not involved in this litigation. King Edward has at no time conceded that such two other plants are subject to the Act, and the District Court's contrary finding (RK 59) is unsupported by the Record.

[6] RK 84A refers to a "columnar chart" filed by Respondents as an exhibit with the District Court at a pre-trial conference (RK 86).

King Edward's tobacco is grown in fields on its farms under cheesecloth shade, which completely covers and encloses the fields (RK 48-49, 57, 91). The fields are highly fertilized and intensively cultivated during the growing period (RK 58, 91).

In harvesting the tobacco, as each leaf reaches a certain state of maturity, it is promptly picked by King Edward's employees and taken immediately to one of several curing barns located on the farm. There the leaf, which has a water content of 80 to 85 per cent, is strung, hung on sticks and dried, permitted to absorb moisture, and then re-dried. In this process, the water content is reduced to between 10 and 25 per cent and the leaf turns into a shade of brown. It is then taken down, packed loosely in boxes and carried to King Edward's packing plant here involved, located not more than thirteen miles from any of King Edward's farms. Immediate transfer from the curing barn to the packing plant is required in order to avoid any harmful stoppage or acceleration of the intra-cellular changes that are continuously taking place within the leaf (RK 49, 50, 51, 58; 91-92; see also *Circular No. 249*, U. S. Department of Agriculture, 1942, entitled "American Tobacco Types, Uses and Markets", p. 49).

When the tobacco arrives at the packing plant, it is piled on the floor in piles or bulks of 3500 to 4500 pounds each for fermentation, and so remains from two to four months.[1] During this period the bulks are taken down

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[1] Fermentation of tobacco is aging the tobacco to make it fit for human use. There are no exceptions to the rule that fermentation must take place before tobacco can be used. See excerpts from *W. W. Garner*, "The Production of Tobacco" (RK 22). Mr. Garner is a noted plant physiologist, employed for 40 years by the United States Department of Agriculture in making scientific tobacco investigations (RK 14-15). The excerpts from his book referred to were attached as an exhibit to an affidavit offered by the Petitioner in opposition to King Edward's first motion for summary judgment, page 11, *infra*. The bulk method of fermentation is described in Mr. Garner's book at RK 25, *et seq.*

from time to time and repiled or rebulked for the purpose of aerating the leaf and preventing excess fermentation in the interior of the bulk, and to assure that the natural changes in the leaves will be as uniform as possible throughout the entire bulk (RK 49, 58, 92; see also RK 26). After the bulking, the leaves are sprayed in order to keep them soft and pliable enough for handling without breakage or injury (RK 49, 52-53). Following this operation the leaves are sorted and graded by hand and then rebulked in order to dry for a further period of from two to four months. The leaves are then baled for sale and shipment to cigar manufacturers (RK 49, 58, 92).

As held by the Court of Appeals (RK 92, 93) and as shown by the uncontradicted facts of record (RK 35), the bulking, sorting and baling of the tobacco at the packing plant are customary and essential operations to prepare the tobacco for market. On the other hand, none of the tobacco is stemmed, cut or treated in the packing plant, and none is "processed" therein other than as previously described (RK 49, 50). Nothing in this Record supports Petitioner's assertion (Pet. Br., pp. 5, 7) that King Edward's packing plant operations require extensive and expensive industrial equipment, and the District Court in effect found otherwise (RK 75). Also, although a bulking plant requires some equipment, the plant is not highly mechanized or industrialized, as Petitioner suggests (Br., pp. 5, 7, 40). All the employees here involved are ordinary tobacco farm laborers. See Figures 24, 42, in *Circular 249*, pp. 49, 84.

The entire process for treating the leaf, from the time it is first hung in the curing barn on the farm until bulk sweating in the packing plant is completed, is one continuous process of natural transformation within the leaf, necessary to assure the desired color and appearance of the leaf, and is completed without adding any external

catalyst or other chemical element or artificial stimulation (RK 50-51). The Court of Appeals described the packing plant operation as the "*natural* heating, fermentation, and curing of this tobacco . . ." [Emphasis supplied] (RK 92). Only the temperature and humidity are regulated both at the barn and in the packing plant,[5] in order to prevent injurious acceleration or stoppage of the gradual and continuous natural internal transformation of the leaf. Such transformation is a process of drying and oxidation, accompanied by chemical changes within the leaf (RK 51).[6] The chemical changes commence at the curing barn and continue throughout the bulk sweating at the packing plant. There is no dividing point between those which occur at the two places (RK 51-52). The expert evidence, upon which Petitioner relies so heavily, itself shows that

> "Typical tobacco fermentation is but the resumption of reactions taking place in the later stages of curing in the barn that have been temporarily suspended by the drying out of the leaf" (RK 23). See also RK 28-29.

And *Circular No. 249*, U. S. Department of Agriculture, p. 124, states that "The chemical changes [effected by the fermentation] represent an extension of the curing process". Petitioner is incorrect, therefore, in asserting (Pet. Br., pp. 5, 6) that King Edward's barn operation is essentially a "drying" operation, while the packing house operation is a "fermentation" operation. In fact both are "drying" and "fermentation" operations and, as noted, together constitute one continuous process. The only reasons for moving the tobacco to the packing house from the barns are that there are insufficient barns on the farms

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[5] Atmospheric temperature is controlled to some extent in the barn, and the temperature of the bulks at the packing plant is controlled by taking down and rebuilding the bulks as previously described (RK 51).

[6] See also RK 18-25, 26-30, describing such changes and their causes.

to store the tobacco until bulking is completed, and the natural transformation within the leaf takes longer in the barns than in the bulking operations performed in the packing plant (RK 51; see also RK 23).

King Edward employs approximately 120 employees at the height of the packing season in its packing plant here involved, and such employees are engaged in bulking, sorting, handling and baling of tobacco and shipping same to market (RK 92, 49, 4). All such tobacco is tobacco grown by King Edward on its farms, as King Edward's plant here involved does not handle tobacco grown by others (RK 4, 49); and the District Court so found (RK 59), as did the Court of Appeals (RK 92). A large majority of the employees who work in the packing plant also work on King Edward's farms, or other farms, in planting, growing, harvesting and barn-curing the tobacco (RK 63, 75-76, 84A, 86, 92-93).

The parties stipulated (RK 46-47) that (a) King Edward employs many of its employees "engaged in the handling of tobacco" in and about its place of business at Quincy, Florida, i.e., its packing plant here involved, at wage rates less than 75 cents an hour, and (b) King Edward does not keep the records of hours worked each workday and each workweek for its said employees as prescribed by the Administrator's Regulations, Part 516, Title 29, Ch. V, Code of Federal Regulations. This stipulation, which is the only evidence as to King Edward's failure to comply with the minimum wage and record-keeping provisions of the Act, describes the employees' work in terms exempt under section 13(a)(10).

2. *Budd*

Budd grows no tobacco but operates a packing plant in Quincy, Florida, employing 108 persons (RB 51-52, 148, 162), at which it handles and prepares for market the tobacco grown by others on their farms (RB 146, 162), all

located within a radius of 30 miles of Budd's plant (RB 34, 145-146, 161; see also RK 50). Budd's packing plant operations are essentially the same as King Edward's (RB 35, 42, 56-57, 141, 142). While the Record shows that Budd's packing plant contains equipment, that equipment, as found by the District Court (RB 148), is simply equipment needed for temperature control in the bulking operations (RB 35; see also Figures 24, 42 in *Circular 249*, referred to supra, p. 7. Budd's plant, like King Edward's, is not highly mechanized or industrialized. Budd's employees, who for the most part live on the tobacco farms all year-round, are also employed in growing the tobacco which they thereafter handle at Budd's packing plant (RB 36, 154, 162).

3. *Background facts*

80 per cent of the 300 farmers in the Quincy area who grow Type 62 tobacco grow less than 25 acres of such tobacco per year (RB 162). This acreage yields insufficient tobacco to enable each farmer to "bulk" his own crop, since a bulk of over 3,000 pounds of tobacco is needed for natural heating, fermentation and curing of the tobacco (*Id.*). Accordingly, these farmers have their tobacco prepared for market by an independent company, such as Budd (*Id.*; see also RB 36). On the other hand, about 70 per cent of all the tobacco grown in the Quincy area is bulked in the growers' own packing plants. The District Court found that of the 2,554 acres planted with this tobacco in the Quincy area, 1,459 are grown by companies operating packing plants in which they handle only tobacco grown by themselves, and an additional 311 acres are grown by companies which operate packing plants handling the tobacco grown on such acreage and also tobacco grown by independent farmers (RB 148).

Quincy, Florida is an agricultural community (RK 11, 50; RB 36) in which the principal source of cash income

comes from the raising of U.S. Type No. 62 tobacco (RB 36). Moreover, about 60 per cent of the income of the population of Gadsden County is estimated to be farm income (RK 10). Employment on farms in Quincy and within one mile thereof, is a substantial part of all employment in that area, and almost 50 percent of the wage earners in the area reside on farms (RK 10, 50).

Five million pounds of tobacco are grown annually in Gadsden and Leon counties, Florida, and in Decatur and Grady counties, Georgia, which adjoin (RK 55-56, 91) said counties in Florida (RK 50). Three million pounds of such tobacco are bulked in tobacco packing plants in Quincy (RK 50). Moreover, the annual production of all agricultural products in Gadsden County, Florida, including all crops, cattle and other farm products, amounts to approximately $12,000,000. Three-fourths of this, or approximately $9,000,000 worth, consists of Type 62 tobacco.[10] And of this amount, 60 per cent is bulked in tobacco packing plants in Quincy (RK 7, 50).

4. *Proceedings below*

Based upon the complaint against it and upon its answer and supporting affidavits, King Edward moved for summary judgment (RK 6-11, 35, 57). Petitioner opposed the motion and the District Court denied it, holding that the action could not appropriately be disposed of on motion for summary judgment (RK 35-37). Subsequently, however, the District Court itself suggested that all parties file motions for summary judgment (RK 57, 86; RB 147); and when this was done (RK 47-48; RB 145), the District Court awarded summary judgment in each case to the Petitioner (RK 55-61, 77-78; RB 145-151, 155-156). Such judgment in each case consisted of an injunction

[10] More than 185 acres, producing substantial quantities of Type 62 tobacco, are located within one air line mile of Quincy (RB 37).

restraining the particular Respondent from violating the minimum wage and record-keeping provisions of the Act (RK 77-78, RB 155-156). The District Court held that Budd's packing plant employees are clearly subject to the Act (RB 149) but it did not discuss the Section 13(a)(10) exemption at all. With respect to King Edward, the District Court held that the exemption for agriculture in the Act ends when the tobacco reaches the receiving platform of the packing plant, and accordingly the packing plant employees are not exempt under the agriculture exemption (RK 60-61, 93). As for the "area of production" exemption in Section 13(a)(10) the District Court held, without assigning any reason, that such exemption also does not apply to the packing plant employees of King Edward (RK 61).

The Court of Appeals reversed the Judgment in both cases. It held that the agriculture exemption in the Act applies to the packing plant employees of King Edward because—

> "It seems clear to us that a farmer cannot function without a market, that everything done by these farmers was essential for the marketing of their crops, and that the work of their packing house employees, in the preparation for market of the leaf grown exclusively on their farms, constitutes 'practices performed by a farmer as an incident to or in conjunction with such farming operations, including preparation for market' within the meaning of Section 203(f)" (RK 93).

The Court of Appeals also held that the Section 13(a)(10) exemption applies to the packing plant operations of both Respondents, saying—

> "After such processing, this type tobacco falls into eight main classifications, and none of those classifications can be determined prior to the processing. Primarily, because it cannot be graded until it has been processed, there is no market at an earlier stage for

this type tobacco. The market variation dependent upon grading is considerable, ranging from a high of approximately $2.40 per pound down to as low as $.40 per pound. . . . When it is considered that admittedly the processing was essential for the marketing of the tobacco, again it seems clear to us that the employees of all of the appellants are exempt under Section 213(a)(10)." (RK 92, 94-95; RB 162, 164).

The Court of Appeals further held that the Administrator exceeded his authority in excluding from the "area of production" any town of 2500 or more population, particularly as applied to the factual situation here presented (RK 93, note 7; RB 163, note 7). It further held that the Administrator was not entitled to an injunction until he made a valid definition of "area of production", since Respondents might "likely fall with[in] a valid definition" (RK 95; RB 165).

SUMMARY OF ARGUMENT

Two separate actions are here involved, presenting questions under Section 13(a)(6) or Section 13(a)(10) of the Fair Labor Standards Act.

I.

The Court of Appeals correctly concluded that King Edward's employees are "employed in agriculture" as defined in Section 3(f), and therefore exempt under Section 13(a)(6), when engaged at its tobacco packing plant in Quincy, Florida, in handling and preparing for market Type 62 tobacco grown exclusively on farms operated by King Edward within 13 miles of that plant. Respondent Budd does not grow any tobacco; the Court of Appeals did not find Budd exempt under Section 13(a)(6); and no contention is made here that the agriculture exemption applies to the employees in Budd's

packing plant in Quincy, engaged in handling and preparing for market Type 62 tobacco grown by various farmers in the locality.

The statutory definition of "agriculture" in the Act is divided into two distinct branches. The first distinct branch—the primary meaning—is "'farming in all its branches", illustrated by "the cultivation and tillage of the soil" and "the production, cultivation, growing, and harvesting of any agricultural . . . commodities". The second distinct branch of the agriculture definition—the broader meaning—includes "practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations", including "preparation for market, delivery to storage or to market or to carriers for transportation to market." *Farmers Irrigation Co.* v. *McComb*, 337 U.S. 755, 762-763. Under the statutory language, such practices are exempt if they are *either* incident to *or* in conjunction with the farming operations. This exemption "was meant to embrace the whole field of agriculture". *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254, 260.

Functionally, the activities of King Edward's employees here involved represent common, everyday activities performed by American farmers and farms. King Edward is obviously "a farmer" within the meaning of the agriculture exemption because it operates farms on which it cultivates and tills the soil, producing, growing and harvesting Type 62 shade-grown cigar wrapper tobacco, an agricultural commodity. King Edward's employees on its farms, when engaged in these activities, clearly fall within the first distinct branch of the agriculture definition. After harvesting, the tobacco leaves are immediately taken to curing barns on these farms, where they are dried, moistened, and redried. The tobacco leaves are then transferred to the packing plant here involved,

where they are piled and repiled in "bulks" of 3500 to 4500 pounds each, under controlled temperature and humidity, to facilitate and continue the natural drying and fermentation of the tobacco, without addition of chemicals or other artificial means. The leaves are then sorted and graded by hand, rebulked, and baled for sale to cigar manufacturers. These packing plant activities of King Edward, the grower, performed exclusively upon tobacco grown upon its own farms, constitute "practices . . . performed by a farmer . . . as an incident to or in conjunction with" the enumerated field operations of King Edward, and therefore fall within the second branch of the agriculture definition. The preparation of Type 62 tobacco, from the time it is first hung in the curing barns on the farm until the bulking is completed in the packing plant, is one continuous and integrated operation, largely performed by the same employees who grow and harvest the tobacco on King Edward's farms. The uncontradicted record shows, and the Court of Appeals found, that such packing plant activities are customary and essential in preparation of the tobacco for market. Primarily because it cannot be graded until it has been bulked, there is no market at an earlier stage for Type 62 tobacco.

The legislative history of the agriculture exemption reinforces its comprehensive language. Beginning with a broad definition of agriculture in the original bill as reported to the Senate, Congress made the exemption more and more inclusive as the bill worked its way through to final passage. Congress clearly expressed the legislative purpose to exempt such "processing" operations as milk bottling, fruit packing, cotton ginning, and hog slaughtering, when performed by the farmer upon his own produce. Congress underscored that intention by striking out limiting phrases such as "ordinarily" performed by a farmer and by adding sweeping language exempting all practices performed "in conjunction with"

as well as "incident to" farming operations, whether "by a farmer" or "on a farm", down to and including "preparation for market", "delivery to storage", and "delivery . . . to market or to carriers for transportation to market". By such successive amendments, the exemption "was broadened until it became coterminous with the sum of those activities necessary in the cultivation of crops, their harvesting, and 'their preparation for market, delivery to storage or to market or to carriers for transportation to market'". *Wirtz*, 349 U.S. at 260. Congress drew no distinction between large and small farmers or between hand labor and mechanized operations. *Id.*, 349 U.S. at 261, 265.

Moreover, the exemptions in Sections 7(c) and 13(a)(10), which were granted to non-farmer processors of agricultural commodities in order to spare the farmer additional costs, emphasize the Congressional intent to exempt operations by farmers themselves, as comprehensively defined in Section 3(f), where additional costs would be even more direct.

Petitioner errs in relying upon Congressional rejection of amendments to the original bill which would have exempted tobacco auction warehouses. Only one of such amendments related to the agriculture exemption in the bill; and none of them related to farmers who, as in the case of King Edward, prepare their own crops for market. The rejected amendments concerned independent seasonal auction warehouses providing facilities for marketing of non-cigar leaf tobacco after it is cured and graded on the farm. The Type 62 tobacco here involved is not sold through auction warehouses, and it cannot be, and is not, marketed until after it is bulked and graded in the packing plant. Furthermore, the purchaser of the non-cigar tobacco at the auction warehouse, commonly a manufacturer, transports the tobacco to his redrying plant, where it is sorted and run through a redrying

machine which conditions it for packing in hogsheads. The natural fermentation process in the case of non-cigar tobacco takes place primarily after the tobacco has been redried, whereas the fermentation of Type 62 tobacco in the packing plant is merely an extension of the barn-curing process, and is essential for the purpose of grading such tobacco for market.

Petitioner derives sweeping and wholly unfounded conclusions about the scope of Section 13(a)(6) from certain *dicta* in *Waialua* (349 U.S. at 267-268) concerning the omission of sugar milling from the exempt operations enumerated in Section 13(a)(10). First, the tobacco packing operation here involved is definitely embraced in Section 13(a)(10), since it constitutes "handling, packing, storing . . . [and] drying . . . [an] agricultural . . . commodit[y] . . . for market", within the meaning of that exemption. Second, the sugar milling involved in *Waialua* was recognized as a borderline case, the opinion confirming that "all other forms of quasi-industrial processing—ginning, canning, packing, etc." are enumerated in Section 13(a)(10) and unquestionably fall within the agriculture exemption when performed by a farmer upon his own produce. Third, the Administrator has recognized in this record (RB 51) and in testimony before Congress as late as 1949 that the all-embracing agriculture exemption does not depend upon the exemptions granted in Section 13(a)(10) to independent operators. Fourth, King Edward's packing operations are a normal incident to the cultivation of Type 62 tobacco, since 70 per cent of all such tobacco grown in the Quincy area is prepared for market in packing plants operated by the growers.

Finally, King Edward satisfies practically all the standards enumerated in *Waialua* for determining the applicability of the agriculture exemption. King Edward's growing operations are substantial and not a mere facade

for an otherwise industrial operation. The product resulting from the packing operation is fermented tobacco, an agricultural commodity. The fermentation of tobacco is not a transformation by manufacturing, as in the milling of sugar cane into raw sugar and molasses. The same employees work on King Edward's farms and in its packing plant. These employees are not typical factory workers, but rather unskilled farm laborers, largely engaged in manual work in the packing plant.

The original administrative interpretations issued by the U.S. Department of Labor after enactment of the Act uphold the exemption of King Edward's packing plant employees under Section 13(a)(6). Such interpretations, which specifically included in the exemption "handling, drying, bulking, stripping, tying, sorting, stemming, packing, and storing" tobacco, have never been changed by re-publication or by press release or any other means bringing the change to the attention of employers, employees and the general public. Such interpretations were in effect on the date of the 1949 amendments to the Act. Accordingly, Petitioner has no support in such amendments or otherwise for overturning an interpretation of almost seventeen years' standing, upon which farmers have regulated their affairs. It is doubtful whether the Secretary of Labor would have attempted such change of interpretation except at the urging of the District Court below.

II.

The Court of Appeals correctly held that the employees of both King Edward and Budd perform operations enumerated in Section 13(a)(10); that the Administrator's definition of "area of production" thereunder is unauthorized by Congress as applied to such opera-

tions in Quincy, Florida; and that Petitioner accordingly is not entitled to an injunction against either Respondent.

Respondents' packing plant employees are "handling, packing, storing . . . [and] drying . . . [an] agricultural . . . commodit[y]", namely Type 62 tobacco, within the common and technical meaning of such terms in Section 13(a)(10). Petitioner stipulated that the employees involved are engaged in "handling" tobacco. The uncontradicted facts of record confirm that the employees are engaged in bulking, shaking, sorting, separating, grading, tying and baling of tobacco, all activities embraced in the operations enumerated in Section 13(a)(10). Moreover, the bulking operations as a whole constitute a gradual and continuous process of drying and oxidation likewise embraced in Section 13(a)(10). The phrase "in their raw or natural state" in Section 13(a)(10) concededly, and as shown plainly by the legislative history, qualifies only the operation "preparing" in Section 13(a)(10), rather than the operations of "handling", "packing", "storing" and "drying". In any case, the fermentation of tobacco in bulk-sweating is properly classified as an operation upon tobacco in the "raw or natural state", since it involves no cooking or artificial means or addition of extraneous materials. The natural chemical changes occurring in the leaf are akin to those in the ripening of fruit. The operations involved here on tobacco are as plainly embraced in the exemption as the ginning, compressing or canning of other agricultural commodities there enumerated, and are far less mechanized. The employees here involved are ordinary farm laborers doing largely unskilled manual work in the packing plants. In no circumstances can such plants be likened to factory-type, industrialized operations such as sugar milling which this Court discussed in *Waialua*.

These interpretations are sustained by numerous decisions in the lower Federal courts, and are substantiated

by the legislative history of the area of production exemption. Congress began with a narrow exemption for preparation, packing and storing of fresh fruits and vegetables in their raw or natural state; broadened the exemption to include these operations upon all agricultural commodities in their raw, natural or dried state; and ultimately enlarged the exemption under the Biermann amendment to encompass all the operations now included in Section 13(a)(10), including "the first processing of things that come off the farm", as explained by the sponsor, and including many operations other than "preparing in their raw or natural state". The omission of the term "processing" from Section 13(a)(10) was intended only to exclude purely manufacturing operations such as textile production or sugar milling, but did not preclude exemption thereunder of "all other forms of quasi-industrial processing" as explained in *Waialua*, 349 U.S. at 268. The Administrator has repeatedly recognized that the scope of Section 13(a)(10) overlaps that of Section 7(c).

Petitioner erroneously relies upon Congress' rejection of amendments to exempt tobacco auction warehouses. In the Senate the amendment offered did not relate to Section 13(a)(10); and in the House the amendment on this subject was offered only after the Biermann amendment had already been adopted. And in any event, as already explained, the operations of tobacco auction warehouses, to which the amendments related, differ both legally and functionally from the bulking operations here presented.

The original administrative interpretations of Section 13(a)(10) exempted the drying, packing and handling for market here involved. Such interpretations were not questioned in Congressional testimony by the Department of Labor as late as 1948, and in the Administrator's An-

nual Report filed in January 1949. Unlike the situation concerning sugar milling (*Waialua*, 349 U.S. at 259-270), no supposedly changed interpretation of Section 13(a)(10) in this regard was subsequently reported to Congress by the Administrator prior to enactment of the 1949 amendments. Moreover, Congress' review of the Act in 1949 touched Section 13(a)(10) only as to definition of the area of production rather than the scope of exempt activities. At worst, the outstanding and published interpretations at the time indicated doubt as to tobacco bulking operations, so that Congress can hardly have "ratified" the alleged change relied upon by the Administrator.

The packing plant operations here involved further satisfy the requirements of Section 13(a)(10) that they be performed upon an agricultural commodity "for market". Bulking is an essential pre-requisite to the marketing of Type 62 tobacco.

Respondents King Edward and Budd, who draw the tobacco bulked in their plants from areas 13 and 30 miles from their respective plants, satisfy the Administrator's definition of "area of production" under Section 13(a)(10) in regard to mileage distance from the surrounding farms. They do not meet the Administrator's added "population" test, which excludes the town of Quincy because its population exceeds 2500. Section 13(a)(10) restricts the Administrator "to the drawing of geographic lines". *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 619. The 2500 population limitation, as here applied, is a non-geographic limitation not authorized by Congress. The record shows beyond question that Respondents' packing plants are within any rational definition of geographic lines describing the "area of production" of Type 62 tobacco. The town of Quincy is a small agricultural community of 6500 population. About 60 per cent of the Type 62 tobacco grown within 30 miles of Quincy is packed therein, largely by the same employees who grow it. This small compact

area around Quincy is the only locality in the United States where Type 62 tobacco is grown. The principal source of cash income in Quincy is the raising of Type 62 tobacco, and about 60 per cent of the income of Gadsden County, where Quincy is located, derives from agriculture. Almost 50 per cent of the wage earners in the area actually reside on the farms. Quincy is thus in the very heart of the area of production of Type 62 tobacco (See Map opposite p. 76, *infra*). Its retail stores, service establishments and public facilities are necessary to serve the requirements of the 4636 employees in the tobacco packing plants in the Quincy area. The undisputed facts of record thus disclose the necessity for discarding the inflexible 2500 population test herein, just as the Administrator's regulation recognizes in other respects different mileage limitations for different commodities and operations and varying distances around the periphery of cities and other places with varying populations.

The great majority of the small farmers in the Quincy area grow less than 25 acres of Type 62 tobacco per year, an amount which is insufficient to be bulked by natural processes in a packing plant. The independently-operated packing plant is thus essential to enable the small farmer to equalize his position with that of the large grower who can afford to operate a packing plant for his own crops. *Waialua*, 349 U.S. at 268. This is precisely the type of case that Congress had in mind in writing the area of production exemption. While stressing the disparities between packing plants in different circuits (Pet. Cert. 14-15), Petitioner ignores the disastrous situation that would be created within Quincy, where the farmer-operated packing plant is exempt under Section 13(a)(6), if the independent packer serving numerous small farmers in the area were not exempt under Section 13(a)(10). In avoiding error under one exemption, the District Court erred under the other. The Court of Appeals properly construed

each exemption in the only way possible to effectuate the Congressional mandate as to both.

By avoiding any population test in the original area of production definition established in 1938, and in the regulation as in effect from 1941 to 1947, the Administrator himself recognized that the purpose of Section 13(a)(10) does not compel the inclusion of such population limitation. Indeed, when such limitation was imposed for a brief period in 1939-1940, the Administrator dropped it from the regulation confessedly because it resulted in numerous inequalities and economic discriminations between establishments located in the area of production as so defined and those outside that area.

The legislative history of Section 13(a)(10) confirms our contention in this regard. Quincy is not an urban industrial center intended to be excluded from the exemption, regardless of the merit of a 2500 population test in distinguishing between rural and urban areas for census, statistical and perhaps other purposes. Rather, Quincy is the type of small rural community which Congress designedly sought to exempt if within the geographical area. Exemption of packing plants in Quincy is entirely in line with the Congressional purpose to establish labor differentials between the large city and the little town. Inclusion of Quincy in the area of production of Type 62 tobacco would exempt fewer than 1600 employees. Obviously distinguishable is *Tobin* v. *Traders Compress Co.*, 199 F. (2d) 8, *cert. den.*, 344 U.S. 909, involving a cotton compress establishment located in a city with population exceeding 30,000, and drawing a substantial percentage of its cotton from distances up to 250 miles away. The Administrator obviously did not consider the merit of the claims of King Edward, Budd, and other tobacco packing plants in Quincy with reference to their being within the "area of production", since he erroneously regarded the operations of such packing plants as not being among those enumerated in Section 13(a)(10).

Petitioner errs in asserting that Congress ratified the Administrator's "area of production" definition by adopting the 1949 Amendments to the Act without changing Section 13(a)(10). The legislative history of such Amendments establishes that there was no such ratification. And in any case the statutory language and purpose were so plain that failure to amend in 1949 cannot constitute adoption of the administrative definition.

III.

If the Court finds that it is inappropriate on the present record to affirm the summary judgments for the Respondents entered below, the actions should be remanded to the District Court with instructions to proceed to trial of the issues. Petitioner himself stressed before the District Court that there were serious and genuine issues on many material facts; such as whether King Edward is a farmer, whether its packing plant operations are incident to or in conjunction with its farming operations, and whether the packing plant employees perform operations enumerated in Section 13(a)(10). The Administrator's population test is so decidedly at variance with the Congressional purpose that a substantial factual showing would be required to uphold its validity as applied to Respondents' operations in Quincy. Petitioner's contentions below in effect concede that the record raises sufficient questions to entitle these Respondents to trial of the issues before an injunction may issue against them.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE EMPLOYEES OF RESPONDENT KING EDWARD, WHO ARE ENGAGED AT ITS TOBACCO PACKING PLANT IN HANDLING AND PREPARING FOR MARKET TYPE 62 TOBACCO GROWN EXCLUSIVELY ON ITS OWN FARMS, ARE "EMPLOYED IN AGRICULTURE" WITHIN THE MEANING OF SECTION 3(f) AND THEREFORE ARE EXEMPT UNDER SECTION 13(a)(6).

King Edward is engaged in a single enterprise—growing Type 62 tobacco and preparing it for market. The activities of its packing plant employees are an essential and integral part of that enterprise (RK 48-53, 57-58, 91-92, 93).

King Edward's activity in preparing its tobacco for market is similar to the activity conducted by large numbers of wheat farmers, cotton farmers, and fruit and vegetable farmers, among many others in the United States, in preparing their crops for market. All such activities are common everyday activities performed by most American farmers. A denial of the exemption to King Edward's activity in preparing its tobacco for market would equally deprive all American farmers of the exemption the Act now grants for preparing their crops for market, whatever such crops might be.[11] See Briefs

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[11] See *NLRB* v. *Campbell*, 159 F.(2d) 184, 187 (C.C.A. 5) where the Court said in holding exempt as "agricultural laborers", under the National Labor Relations Act, employees engaged in packing and preparing for market tomatoes grown by their employer on his farm:

> "Congress, as well as this Court, has recognized that the packing and preparing of agricultural products for the market is a necessary incident to any agricultural operation, for no farmer, dependent upon that which he produces to sustain his

for American Farm Bureau Federation and National Grange *et al., amici curiae* herein.

We submit that the language and legislative history of the exemption, as well as the controlling case law and the published and outstanding administrative interpretations, all show that the work of the employees here in question falls within the exemption.

A. THE LANGUAGE OF THE AGRICULTURE EXEMPTION EXEMPTS THE WORK OF THE PACKING PLANT EMPLOYEES OF RESPONDENT KING EDWARD

1. *Analysis of the statutory language*

This Court has said that "employment in agriculture is probably the most far-reaching" of the exemptions in the Act, *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 612, and that the agriculture "exemption was meant to embrace the whole field of agriculture". *Maneja* v. *Waialua Agricultural Company*, 349 U.S. 254, 260.

The statutory definition of agriculture (Section 3(f)) is divided into two distinct branches. The first distinct branch—the primary meaning—is "farming in all its branches and among other things includes the cultivation and tillage of the soil, . . . the production, cultivation, growing, and harvesting of any agricultural . . . commodi-

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operations, could long exist if he could not market that which he produces, *and so long as the operation of washing, packing and preparing for market by the employees of a farmer is on that only which he has produced on his farm, it is a necessary incident to farming and is agricultural labor.* . . . So long as these undertakings are in the preparation and packing by him for the market of that which he has grown on his farm, the labor necessary thereto is agricultural labor" [Emphasis supplied].

ties . . ." See *Farmers Irrigation Co.* v. *McComb*, 337 U.S. 755 at 762. The second distinct branch of the statutory definition of "agriculture"—the broader meaning—includes "practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market". This part of the definition embraces "practices, *whether or not themselves farming practices*, which are performed either by a farmer or on a farm". *Id.*, 337 U.S. at 763. [Emphasis supplied]. Under the language of the exemption, it will be noted, such practices are exempt, if they are *either* incident to *or* in conjunction with [12] the farming operations; they do not have to be both.

Under the carefully drafted statutory language, the exemption thus starts with the growing of the agricultural commodity, continues with its cultivation and harvesting, includes its preparation for market or delivery to storage, and ends only after the farmer has delivered it to market or for transportation to market.

2. *King Edward is a farmer.*

The Court of Appeals correctly concluded that King Edward is a "farmer" within the sense used in Section 3(f), since it conducts the farming operations enumerated in the statutory definition of producing, cultivating, growing and harvesting tobacco (RK 93). Moreover, the packing house activities of the employees involved here are integrated and coordinated with and an indispensable part of King Edward's operations of producing, cultivating, growing and harvesting tobacco. *Supra*, pp. 5-9.

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[12] The term "incident" is defined in Webster's New International Dictionary, Unabridged Version, 1955 ed., p. 1257, as meaning "appertaining to", "directly and immediately pert. to, or involved in, something else". "Conjunction" is defined as "association", "occurrence together". *Id.*, p. 565.

Petitioner's repeated references to King Edward's *off-the-farm* bulking operations (Pet. Br., pp. 2, 18, 50) imply that King Edward's packing operations are not within the exemption because they take place off the farm. But this overlooks the fact that the agriculture exemption includes all activities performed "by a farmer", whether or not performed "on a farm". And the Administrator himself has consistently taken the position that all incidental and conjunctive practices, if performed by a farmer, are exempt, and in that situation, "it makes no difference whether they are performed on or off the farm". *Interpretative Bulletin No. 14*, U. S. Department of Labor, issued August, 1939, ¶10, WHM 35:351, 354. This Court in *Maneja* v. *Waialua Agricultural Company*, 349 U.S. 254, 261, held exempt a farmer's incidental activities, such as "delivery to storage or to market or to carriers for transportation to market", even though performed off the farm.[13]

Petitioner's main argument, however, is that the agriculture exemption does not apply to tobacco bulking, when done by the farmer, whether he does it on or off the farm. In this connection, it will be noted that of the 15 tobacco packing plants in the Quincy area (RK 57, 84A, 86), three are located directly on tobacco farms. Two of these, namely those of American Sumatra Tobacco Corporation and of H. E. Carry, pack only the tobacco they grow themselves (*id.*). Petitioner's argument would deny the agriculture exemption even to such packing plants.

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[13] Equally irrelevant is the fact that King Edward leases its farms and packing plant facilities from an affiliated company. The Administrator has ruled that where a packing house operator leases a farm and then proceeds to operate the farm, planting, growing and harvesting crops and then packing such crops, the agriculture exemption applies to the employees engaged in the said packing operations. See opinion reported at WHM 35:751 and set forth in Appendix C, p. 107, *infra*.

3. *The activities of the employees at King Edward's packing plant are within the plain language of the agriculture exemption.*

Contrary to Petitioner's assertion (Pet. Br., pp. 53-54, note 20), the undisputed facts of record show (RK 25, 35, 50-51) that the activities of the packing plant employees in bulking, sorting and baling the tobacco were customary and essential operations to prepare King Edward's tobacco for market. The Court of Appeals also found that until the bulking operation is completed, Type 62 tobacco cannot be graded and consequently "there is no market at an earlier stage for this type tobacco"; and that the packing plant operations are "essential for the marketing of [the farmers'] crops" (RK 92, 93). The undisputed facts further show that the preparation of Type 62 tobacco, from the time it is first hung in the curing barns on the farm until the bulking is completed in the packing plant, is one continuous and integrated process, largely performed by the same employees who grow and harvest the tobacco on King Edward's farms. *Supra*, pp. 6, 7-9 (RK 50-51, 51-52).[14] Moreover, King Edward's packing plant here involved handles only the tobacco grown by itself on its own farms (RK 59, 92).

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[14] Since the process is one continuous and integrated one, no basis exists for Petitioner's assertion (Pet. Br., p. 54, note 21) that the sugar milling involved in *Waialua* was "much closer in both time and sequence to the actual farming than is the tobacco bulking in the instant case". As Petitioner admits (Pet. Br., p. 4), as soon as the tobacco is picked in the field it is taken immediately to a curing barn where it is strung on sticks and hung to dry. This is the beginning of the single continuous process which ends in fermented tobacco and is comparable to the activity in *Waialua* of immediately conveying the freshly cut cane to the sugar mill.

The record does not substantiate Petitioner's inference that "Type 62 tobacco not only can be, but often is, marketed by the farmer in an uncured state prior to bulking" (Pet. Br., p. 54 note 20). In King Edward's other two plants which bulk tobacco purchased from farmers, the purchase price is customarily established according to grades after bulking.

In the light of these facts, King Edward's packing plant activities are clearly exempt as "practices . . . performed by a farmer . . . incident to or in conjunction" with farming. Surely, if the words "preparation for market" are to be given any meaning with respect to farming of Type 62 tobacco, they plainly embrace such packing plant activities.

Petitioner asserts that the agriculture exemption is inapplicable here because the term "practices", as used in Section 3(f), suggests only activities "ordinarily" carried on by farmers with their "ordinary" farming (Pet. Br., pp. 52-53). But this argument cannot be reconciled with the fact that the statutory language itself, in giving examples of exempt "practices", lists "preparation for market"—the very practice in issue here. That is, Congress specifically exempted the activities involved here, namely "preparation for market", when performed by a farmer.

B. THE LEGISLATIVE HISTORY OF SECTIONS 13(a)(6) AND 3(f) ALSO SHOWS THAT THE WORK OF KING EDWARD'S PACKING PLANT EMPLOYEES IS EXEMPT THEREUNDER.

The comprehensive character of the "agriculture" exemption is fully borne out by its legislative history.

1. *Senate proceedings.*

S. 2475,[15] which ultimately became the Fair Labor Standards Act of 1938, was introduced in the Senate on May 24, 1937. As the bill was introduced, agricultural laborers

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[15] The bills in their various forms—as introduced, as reported, etc.— referred to in this discussion of the legislative history are collected in "Senate Bills, 75th Cong., 1937-38, Vol. 13, 2401-2550, J-50-2d Set" (Library of Congress).

were exempt (§2(a)(7)), but there was no definition of the term "agricultural laborer".

The Senate Committee on Education and Labor, to which the bill was referred, rewrote the agricultural exemption. The Committee bill exempted "any person employed in agriculture" without limitation; and the Committee wrote into the bill its own comprehensive definition of "agriculture" as including

> ". . . farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, forestry, horticulture, market-gardening, and the cultivation and growing of fruits, vegetables, nuts, nursery products, ferns, flowers, bulbs, livestock, bees, and poultry, and further includes the definition contained in sub-division (g) of section 15 of the Agricultural Marketing Act, approved June 15, 1929, as amended, or any other agricultural or horticultural commodity, *and any practices ordinarily* performed by a farmer as an incident to such farming operations". [Emphasis supplied].

See S. 2475 as reported in the Senate July 6, 1937, §2(a)(7), Calendar No. 905, 75th Cong., 1st Sess., pp. 50-51.

Contrary to Petitioner's contention (Pet. Br., p. 53), the Committee Report stressed the exemption of "processing" operations under the broad definition of "agriculture", declaring that the reported bill excluded—

> "persons engaged in agriculture and such *processing* of agricultural commodities as is *ordinarily* performed by farmers as an incident of farm operations" (*S. Rep. 884*, 75th Cong., 1st Sess., p. 6). [Emphasis supplied.]

Senator Black, chairman of the Senate Committee in charge of the bill, stated that it—

> *"specifically excludes workers in agriculture of all kinds and of all types. There is contained in the measure, perhaps, the most comprehensive definition of agriculture which has been included in any one legislative proposal.*

> "We have placed together in the bill definitions of agricultural work which have been fixed from time to time in other legislative enactments, and in addition to that we have drawn liberally from Mr. Webster's definition of agriculture." 81 Cong. Rec. 7648. [Emphasis supplied.]

In debate, Senator Pope asked if "dairying" would include "the farmer who bottles his own milk and cream and sells it . . . even though he might do it in considerable quantity". Senator Black answered, "Unquestionably", and further, "I have no doubt that a dairy farmer who bottles his own milk is still a dairy farmer. The fact that he bottles it would not change his characteristics from that of a farmer." 81 Cong. Rec. 7656.

Senator Black also commented that while the Committee was not in favor of exempting the packing business as it related to many agricultural products, "*the farmer or the apple grower has a perfect right, of course, to pack his own apples either alone or in cooperation with his farming* neighbors . . ." [Emphasis supplied.] *Id.*, p. 7657.[16]

Thereafter Senator Schwellenbach made the following statement:

> "When an apple grower picks his apples and takes them into his own warehouse . . . and in that warehouse packages them and then stores them, or perhaps first stores them and then packages them, the work being done by the farmer on his own farm, there is *no dispute about the fact that it is an agricultural operation* . . . It seems to me that the bill, under the definitions as they now stand, places at a considerable

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[16] Senator Copeland later questioned Senator Black on the packing by a farmer of his own apples, his placing them in a storage house, and his subsequent transportation of the apples to market. Senator Black stated that such operations would be exempt. He drew an analogy between such operations and those of a farmer raising watermelons who packs his fruit in crates and then takes them to town to sell them either to a broker or from house to house. All such operations, he stated, would be exempt. 81 Cong. Rec. 7658.

> disadvantage the man who is too small an operator to perform these operations upon his own farm . . . The picking of the apples is an agricultural process. If the man does it on his own ranch, the storing of the apples and the washing of the apples and the packing of the apples are all agricultural processes." [Emphasis supplied]. 81 Cong. Rec. 7659.

Senator Schwellenbach's unchallenged statement is particularly significant. It shows recognition by the Senate that processing by a farmer of his own crops for market was intended to be exempt under the agriculture exemption, regardless of the status under the Act of processing done by an independent plant separate from the grower. Thus Congress was fully aware of the fact that a farmer processing his own crops for market might enjoy a competitive advantage over the grower who did not have his own processing facilities. To relieve any inequity resulting to the small farmers who do not have their own packing or processing plants, Congress enacted Section 13(a)(10). See *Maneja* v. *Waialua Agricultural Company*, 349 U.S. 254, 267-268. But Congress did not make the agriculture exemption dependent upon whether it had succeeded in every instance in relieving the inequity.

Senator Overton asked Senator Black whether, if a farmer has a large cotton plantation and gins his own cotton, the ginning operation is exempt. Senator Black replied in the affirmative, that such cotton ginning would be a process in the agricultural handling of cotton. *Id.*, p. 7657.

Later in the debates, Senator Black, commenting upon a suggestion of Senator Schwellenbach that the line of distinction be made at the point of agricultural operation and that "when it becomes a processing operation, a canning operation, it ceases to be an agricultural operation," stated as follows: "Going into another phase of farming, let us take the man who raises hogs. *A great many farmers who raise hogs kill their hogs on their own farms* . . .

They prepare the hogs for market on their own farms, and then send out the product. As the bill is framed, there would be no possible manner in which their employees could be included under the provisions of the bill, because that would clearly be farming; . . .". [Emphasis supplied]. *Id.*, p. 7659.

The reported bill exempted "such processing . . . as is ordinarily performed by farmers as an incident of farm operations." *Supra*, p. 31. But the word "ordinarily" was later stricken from the exemption before the bill was enacted.

Senator McGill later introduced an amendment (*Id.*, p. 7888) to provide that the agricultural exemption should apply not only to practices performed *by a farmer* as an incident to his farming operations, but also to practices performed *on a farm* as an incident to such farming operations. His amendment further provided that following the words "any practices ordinarily performed by a farmer or on a farm as an incident to such farming operations," there be added the words "including delivery to market". Senator McGill stated that his amendment would exempt all kinds of labor performed in connection with making delivery to market of agricultural products. *Id.*, pp. 7888, 7927, 7928. The amendment was adopted. *Id.*, p. 7888.[17]

Petitioner refers to the rejection of an amendment offered by Senator Reynolds of North Carolina to exempt certain tobacco warehouses, as purportedly showing that

[17] The discussion on the McGill amendment and also on a related amendment introduced and then withdrawn by Senator McAdoo appears in Appendix B, pp. 98-101, *infra*.

Congress omitted the type of work here involved from the agriculture exemption when performed by the tobacco grower upon his own crops (Pet. Br., pp. 42, 52; Pet. Sep. App., pp. 100-119). It is perfectly plain, however, that Senator Reynolds' amendment did not refer to a tobacco packing plant such as King Edward's, in which a farmer prepares his own tobacco for market, but rather referred to the seasonal auction warehouse, to which growers of non-cigar tobacco bring their tobacco for sale, immediately after it has been "cured" and graded in the farmers' barns.[18] (81 Cong. Rec. 7878-7889). The debates also show that Senator Reynolds' amendment was rejected largely because other provisions of the bill then being debated already provided exemption for seasonal activities (81 Cong. Rec. 7880, 7883, 7886). Furthermore, the Reynolds amendment was a self-contained amendment providing exemption from the operation of the entire statute rather than directed to the agriculture exemption as such (81 Cong. Rec. 7878; Pet. Sep. App., p. 100); and by the time it was debated and disposed of, there had already been

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[18] "The auction, or loose-leaf market, is now the prevailing system of selling tobacco in all tobacco-growing territory from southern Ohio and Indiana southward, in which are included all states south of the Ohio and Potomac Rivers in which tobacco is grown on a commercial scale (*except for the cigar-leaf districts of Florida and Georgia*). Reduced to its simplest terms, an auction floor is a place where growers may deliver their tobacco and have it auctioned off to the highest bidder, the bidders being buyers for manufacturers, dealers, exporters, or speculators. The system is of vast proportions, represents a large total outlay of capital and the employment of large numbers of people, and provides the means for selling more than a billion pounds of tobacco annually during the months from August to April" [Emphasis supplied]. *Circular 249*, p. 61, *supra*. See also pp. 6 *et seq.*, 123-124, of such Circular; and *Yearbook of Agriculture*, 1954 (U. S. Department of Agriculture), p. 440.

full debate showing that the farmer as such was wholly exempt when preparing his crops for market, as for example, when he bottled his milk, packed his apples, ginned his cotton or slaughtered his hogs. In the light of such debate, it cannot be seriously questioned that the Senate fully comprehended that the tobacco farmer, like the dairy farmer, fruit farmer, cotton farmer, or livestock raiser, was totally exempt when preparing his own crops for market.

The bill passed by the Senate on July 31, 1937 defined "agriculture" in relevant part as including

> ". . . any practices *ordinarily performed* by a farmer or *on a farm* as an incident to such farming operations, *including delivery to market* [Emphasis supplied].

2. *House proceedings.*

The bill was thereupon referred to the House Committee on Labor. As reported by that Committee on August 6, 1937, "agriculture", insofar as relevant here, was defined as including

> ". . . *any practices performed by a farmer or on a farm* as an incident to such farming operations, *including delivery to market* . . ." [Emphasis supplied]. §2(a)(7), S. 2475 as reported, Union Calendar No. 535, 75th Cong., 1st Sess., pp. 4-5.

The bill as reported by the House Committee thus struck "ordinarily" from the definition of agriculture, so that the definition included *any practices* performed by a farmer or on a farm as an incident to farming operations, without qualifications. The Committee report made specific reference to the fact that it had struck the work "ordinarily", thus showing that such action was not inadvertent. H. Rep. 1452, 75th Cong., 1st Sess., p. 11. And the definition as ultimately enacted did not contain the word "ordinarily" or any similar limitation.

The Rules Committee of the House refused to grant a rule, but on December 13, 1937, that Committee was discharged from further consideration of the bill by petition of the House membership. However, on December 17, 1937, the bill was recommitted to the Labor Committee. At that time, insofar as relevant, "agriculture" was still defined as when the bill was reported on August 6, 1937.

On April 21, 1938, another draft of S. 2475 was reported to the House. As reported the definition of "agriculture" was again broadened, and, insofar as relevant, read as follows:

> "'Agriculture' includes . . . *any practices performed by a farmer or on a farm as an incident to such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market*" [Emphasis supplied]. §3(f), S. 2475, 75th Cong., 3d Sess., reported with amendment, Union Calendar No. 804, p. 50; H. Rep. 2182, 75th Cong., 3d Sess., pp. 2, 8.

This definition added the phrases: "preparation for market, delivery to storage . . . or to carriers for transportation to market". The bill passed the House on May 24, 1938 in this form. 83 Cong. Rec. 7397, 7450.

Petitioner refers to certain amendments offered in the House by Congressman Cooley and Barden to exempt persons employed in tobacco auction warehouses from both the wage and overtime provisions of the Act or simply from the overtime provisions (Pet. Br., pp. 42-43, 52; Pet. Sep. App., pp. 119-133). He contends that the rejection of such amendments shows that the Congress did not intend the agriculture exemption to apply in the circumstances here. But it will be noted that of such amendments only Congressman Barden's, offered on December 17, 1937 (82 Cong. Rec. 1783; Pet. Sep. App., pp. 119-122), was directed to the agriculture exemption. Moreover, none of such amendments related to a farmer preparing his own tobacco for market, and none related to Type 62 tobacco.

which is not sold through auction warehouses at all. *Supra*, p. 35, note 18.

3. *Conference Report and debates thereon.*

The Conference Report not only retained every single amendment that had broadened the definition of "agriculture", but it made that definition still more inclusive by exempting all practices performed by a farmer or on a farm "*in conjunction with such farming operations*". 83 Cong. Rec. 9246-9247. Thus Congress was even unwilling to restrict the definition to practices that were *incident* to farming operations, but made explicit its intent that the exemption should apply as well to practices *in conjunction with farming operations.*

In Senate debate on the Conference Report, Senator Elbert D. Thomas, who had succeeded Senator Black as chairman of the Senate Committee on Education and Labor and was chairman of the Senate conferees, stated that the agricultural exemption was purposely all-inclusive. 83 Cong. Rec. 9162-9163. See Appendix B, pp. 101-102, *infra.*

4. *Conclusion on legislative intent.*

Thus, from the very beginning of the legislative consideration of the Act, a comprehensive exemption of agriculture was a primary consideration of Congress. Congress started with such a comprehensive exemption, and at every stage of its consideration by one or the other of the houses of Congress, as the bill worked its way through to passage, the definition was made more and more all-inclusive. See *Wialua*, 349 U.S. 254, 260.

Congress also recognized from the outset that the exemption was to include "processing" when performed by the farmer as an incident to his farm operations. Petitioner's contention to the contrary (Pet. Br., pp. 52-53) will not bear analysis:

First, this Court frequently used the word "processing" in its *Waialua* opinion, in describing the operations of a farmer which are exempt under Sections 13(a)(6) and 3(f). 349 U.S. at pp. 265, 268.

Second, Petitioner's argument is simply one of semantics. Regardless of whether King Edward's packing plant operations may properly be described as "processing", such operations clearly fall within the statutory exemption for "any practices . . . performed by a farmer . . . as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market".

Third, even if King Edward's packing plant operations may properly be called "processing", the debates in the Senate clearly show that where a farmer processes for market only his own grown crops, such processing was intended to be exempt, whether it was done by a dairy farmer bottling his milk, an apple farmer packing his apples, a cotton farmer ginning his cotton, a livestock raiser slaughtering his hogs, etc.

The debates, to which Petitioner alludes (Pet. Br., pp. 53, 45-46) as evidencing a contrary intent, relate to the area of production exemption under Section 13(a)(10) discussed hereinafter, and not to the Section 13(a)(6) agriculture exemption here discussed. We shall show hereinafter, p. 69, that even as to Section 13(a)(10) such debates do not support Petitioner's position. And even if, as Petitioner contends (Pet. Br., p. 51), an operation is not exempt under Section 13(a)(6) if it is omitted from Section 13(a)(10), the operations here involved are nevertheless included within Section 13(a)(10). *Infra*, pp. 58-63.

Fourth, by selecting the word "practices" rather than the word "processing" for use in the agriculture definition, Congress selected a more comprehensive word that in

cludes not only processing but other activities as well. The statutory definition gives as examples of "practices" "performed by a farmer", which are to be exempt, the following: "preparation for market", "delivery to storage", "delivery . . . to market", and "delivery . . . to carriers for transportation to market". The Senate debates recognize that "processing" by a farmer is a form of preparation for market. But "processing" does not describe the other illustrations of "practices" in the statutory definition, so that Congress could not substitute the word "processing" for the word "practices", as suggested by Petitioner (Pet. Br., p. 53).

It is also noteworthy that unlike similar language in Section 13(a)(10), the exemption for "preparation for market" is not limited by the requirement that the "preparation for market" of the agricultural commodities be of the commodities in their raw or natural state. Hence, any preparation for market by the farmer is exempt even if in such preparation the raw or natural state of the commodities is changed. Accordingly, even if contrary to our contention the packing plant operations here effect a change in the raw or natural state of the tobacco, such operations are nevertheless exempt.

Without the broad definition of "agriculture" which was written into the bill, it is a reasonable conclusion from the legislative history that the bill would not have been enacted into law (83 Cong. Rec. 7393, 9257).

No distinction was drawn by Congress between "large" or "small" farms or between "hand labor" or "mechanized" farms. *Wajahua*, 349 U.S. 254, 261, 265. And throughout American agriculture, growing operations are commonly integrated with processing operations. *Supra*, pp. 25-26, 32-34.

C. RELATED EXEMPTIONS FOR AGRICULTURAL PROCESSORS EMPHASIZE THE FAR-REACHING CHARACTER OF THE AGRICULTURE EXEMPTION.

The determination of Congress to exempt all activities conducted by the farmer as an incident to or in conjunction with his farming operations is underscored by the widespread exemptions which were also granted to non-farmer processors of agricultural commodities in Sections 7(c) and 13(a)(10). The legislative history shows that those exemptions were granted in order to avoid imposing additional costs upon the farmer. See in particular 83 Cong. Rec. 7325, 7326, 7401, 7402, 7407-7408; and see also 81 Cong. Rec. 7648-7673, 7876-7888, 7927-7929, 7947-7949, 7957, and 83 Cong. Rec. 7419, 9162-9163, 9250, 9252, 9254. In fact, as the Congressional debates show, such exemptions were an integral part of the same general exemptive scheme for agriculture. See *Waialua*, 349 U.S. 254, 267-268; *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 612-613.

If Congress exempted the processing of agricultural commodities by non-farmers to spare the farmer additional costs, it manifestly intended the comprehensive language of Section 3(f) to exempt operations by farmers themselves, where additional costs would be even more certain.

D. THE DECIDED CASES SUSTAIN THE EXEMPTION OF KING EDWARD UNDER SECTIONS 3(f) AND 13(a)(6).

The foregoing analysis of the language and legislative history of the agriculture exemption is fully supported by this Court's decisions in *Maneja* v. *Waialua Agricultural Company*, 349 U.S. 254 and *Farmers Irrigation Company* v. *McComb*, 337 U.S. 755, the only two decisions of this Court dealing with the agriculture exemption.

1. *Waialua Case*

a). In the *Waialua* case this Court denied the agriculture exemption to the sugar-milling operation of a large Hawaiian sugar plantation which milled only the sugar cane grown on the plantation. After pointing out that the status of farmers milling their own sugar *vis-a-vis* the agriculture exemption may well be *sui generis* (349 U.S. at 267), the Court stressed the omission of sugar milling from Section 13(a)(10). But the Court added that "all other forms of quasi-industrial processing—ginning, canning, packing, etc.", are enumerated in Section 13(a)(10).[19] And if enumerated there, the processing is likewise within the agriculture exemption when performed by a farmer upon his own products. *Id.*, p. 268. Thus, the Court pointed out that by virtue of Section 13(a)(10) the cotton farmer without a gin was placed upon an equal footing with farmers who ginned their own cotton, the latter being exempt under Section 13(a)(6). 349 U.S. at pp. 267, 268. It follows that a tobacco farmer without his own packing plant was also placed upon the same footing as a tobacco farmer with a packing plant. The former enjoys the benefit of the Section 13(a)(10) exemption; the latter the Section 13(a)(6) exemption.

The majority opinion in the *Waialua* case (*id.*, p. 268) stated that the purpose of Section 13(a)(10) was to equalize the status of small and large farmers under the Act; and that sugar milling is not exempt under Section 13(a)(6) because it is likewise excluded from Section 13(a)(10). The concurring and dissenting opinion (*id.*, p. 279) disagreed with this conclusion, stressing that Section 13(a)(10) was added late in the legislative development of the bill, not to restrict existing exemptions but to create fur-

[19] That the operations involved here are indeed enumerated in Section 13(a)(10), see pp. 58-63, *infra*.

ther exemptions.[20] In regard to the majority view, we submit:

First, the tobacco packing here involved is an operation included in Section 13(a)(10). *Infra*, pp. 58-63.

Second, the statements upon which Petitioner relies (Pet. Br., pp. 51, 58-59), are strictly applicable only to sugar milling which presents a unique borderline case (see 349 U.S. at 264, 267) and cannot be given the sweeping construction for which Petitioner contends, namely that no operation is exempt under Section 13(a)(6) unless it is also exempt under Section 13(a)(10). For example, the *Waialua* opinion expressly stated that cotton ginning, if performed by the farmer upon his own crops, is exempt under the agriculture exemption (349 U.S. at 267); and it implied as much with respect to canning and packing and in fact all forms of quasi-industrial processing of agricultural commodities other than sugar milling, because all such operations are also enumerated in Section 13(a)(10). *Id.*, p. 268. Yet undoubtedly many gins, canneries and packing plants are not within the "area of production". That does not mean that a farmer, who is canning, packing, ginning, etc., his own crops for market is not exempt under the agriculture exemption. If it meant that, then no farmer preparing his own crops for market could ever enjoy the agriculture exemption because, as the Administrator has recognized, there are always some independent plants engaged in the same activities which are not within the "area of production". See Administrator's Findings published in connection with his definition of "area of production" (Pet. Sep. App., pp. 12-13).

Moreover, at one point in this litigation Petitioner responded as follows to Respondent Budd's request for ad-

[20] In *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, 615, this Court recognized that Section 13(a)(10) was added "for enlarging the range of agricultural exemption".

missions as to American Sumatra Tobacco Corporation, another tobacco company in the Quincy area engaged in operating a packing plant at which it prepares for market only the tobacco grown by itself:[21]

> "The status of American Sumatra Tobacco Corporation, a farmer, is immaterial to this cause. The reason the employees of defendants may not be exempt is because they are not engaged in farming, nor are they employed by a farmer or on a farm. If the employees of American Sumatra Corporation are exempt it is by virtue of Section 13(a)(6), which section was inserted by Congress itself. *Section 13(a)(6) is a separate and distinct section applying to employees employed in agriculture. Congress went further and defined agriculture. Congress thereby indicated its considerations of farmers and agriculture.* However, Congress recognized that there might be instances where Section 13(a)(6) would not apply and an exemption would be desirable. It passed Section 13(a)(10), but recognizing the gigantic task of formulating a set of standards defining "area of production" which would be applicable on a nation-wide basis it declined to define these terms and delegated to the Administrator the duty of so doing. *Section 13(a)(10)*, with which we are here concerned, *is a complete section in itself and cannot be defined or interpreted by reference to other sections of the Act.* Defendants' position cannot be discussed with reference to Section 13(a)(6) since they are not farmers, but are manufacturers, nor do their activities constitute farming nor do they occur on a farm" [Emphasis supplied] (RB 54).

Petitioner thus has himself admitted in this very litigation that a farmer's exemption under Section 13(a)(6) does not depend upon whether the independently owned packing plant which packs tobacco grown by others enjoys exemption under Section 13(a)(10).

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[21] Petitioner has also brought suit against American Sumatra Tobacco Corporation, but such suit is being held in abeyance pending disposition of the instant litigation (RK 57, 84A, 86).

Furthermore, in hearings held in 1949 before the House Committee on Education and Labor on various amendments to the Act, the Administrator made it plain that the agriculture exemption in the Act did not depend upon the exemptions granted in Section 13(a)(10) to independent processors. The Administrator was at that time asking Congress to eliminate the Section 13(a)(10) exemption, but he stated that that would have no effect upon the agriculture exemption (*Hearings on H.R. 2033*, 81st Cong., 1st Sess.):

> "Mr. Barden. Then you do not regard that the authority you ask for here in any way interferes with the growing and the carrying to market, and packaging, and so forth, and so on, of the operations carried on by the farmer and his employees?
>
> "Mr. McComb (The Administrator). That is right.
>
> "Mr. Weiss (Director, Wage Determinations and Exemptions Branch, Wage and Hour and Public Contracts Divisions). That is on wages and hours.
>
> "Mr. Barden. And that carries him to when he delivers it to the market, and it passes beyond his control; is that right?
>
> "Mr. McComb. The first process; yes." . . . (p. 79).

b). In *Waialua* this Court also emphasized other factors in determining the applicability of the agriculture exemption. Most of such factors are present here. Thus:

(i) King Edward's growing operations are substantial and are not a mere facade for an otherwise industrial operation. 349 U.S. at 264. King Edward's farms have an aggregate acreage of approximately 3800 acres, 892 of which are under cultivation and 206 of which are devoted to tobacco growing. *Supra*, p. 5. Moreover, an affidavit filed in the District Court by Petitioner's own investigator shows that in the 1951 crop year King Edward grew 240,498 pounds of tobacco on its farms, and

that the cost to King Edward for growing its 1950 tobacco was approximately $482,000 (RK 13, 14).[22]

(ii) The product resulting from Respondent's operation is fermented tobacco leaf. As the Court below found, *supra*, p. 8, fermentation involves only natural, not artificial, changes in the tobacco leaf. See also p. 66, *infra*. This differs from the milling of sugar cane, which transforms such cane by a manufacturing process. Hence, there is no basis for analogizing fermentation to manufacturing. 349 U.S. at 264-265. There is no foundation for Petitioner's contention that bulking is a manufacturing operation which greatly changes the "raw or natural state" of the tobacco (Pet. Br., pp. 57-58). At most, Petitioner shows only that bulking effects chemical changes in the tobacco leaves, which are simply natural changes, without the addition of any external element, commencing in the curing barns on the farm and continuing in the bulking operations at the packing plant. *Supra*, pp. 7-8. The bulking operation is hardly comparable to milling sugar cane, which transforms the cane from its raw or natural state into raw sugar or molasses.

(iii) The same employees work on King Edward's farms and in its packing plant. *Supra*, p. 9, 349 U.S. at 265.

(iv) King Edward's tobacco packing operations are not industrialized as alleged in Petitioner's brief, pp. 53, 56, 57. Unlike the mill workers involved in *Waialua*, the employees here are not typical factory workers, but rather are ordinary farm laborers largely engaged in unskilled manual work. *Supra*, p. 7; see also RK

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[22] The affidavit referred to was offered in opposition to King Edward's first motion for summary judgment. *Supra*, p. 14. The affidavit shows the substantial nature of King Edward's tobacco growing operations, although the figures therein relate to the aggregate operations at all three packing plants of King Edward, including two plants not involved in this action (RK 59).

75. 349 U.S. at 265. In any event, as this Court also recognized in *Waialua* (349 U.S. at 261, 265), if the packing plant operations are part of King Edward's agricultural venture, they would be within the agriculture exemption, even if they were industrialized and involved highly specialized mechanical tasks.

(v) King Edward's packing plant operations are a normal incident to the cultivation of Type 62 tobacco, since 70 per cent of all such tobacco grown in the Quincy area is bulked and prepared for market in the packing plants of the growers. *Supra*, p. 10. 349 U.S. at 267.

(vi) In *Waialua* this Court referred to the fact that Section 7(c) grants a complete exemption from the overtime provisions of the Act to sugar milling and it suggested that this may have been considered a satisfactory answer to the difficult problem posed in determining whether sugar processing comes within the agriculture exemption. 349 U.S. at 267. But the tobacco operations involved here are not specifically granted any exemption in Section 7(c). Tobacco as such is not even mentioned in Section 7(c).

In any event, as this Court further recognized, the exemption of an operation in Section 7(c) does not preclude the application also of the agriculture exemption to the same operation, because

> ". . . section 7(c) includes similar exemptions for operations like cotton ginning, which are also within the agriculture exemption if performed by the farmer on his own crops." 349 U.S. at 267.[23]

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[23] Other factors referred to by the Court as shedding some light on the application of the agriculture exemption to an agricultural processing operation are: (vii) the investment in the processing operation as opposed to the ordinary farming activity; (viii) the time spent in processing and in ordinary farming; and (ix) the degree of separation by the employer between the various operations. 349 U.S. at 265. As to (vii) and (viii) the Record here is

2. *Farmers Irrigation Case*

The ruling of the court below is likewise in full harmony with this Court's decision in *Farmers Irrigation Company* v. *McComb*, 337 U.S. 755, holding that the employees of a farmers' mutual irrigation company were not within the agriculture exemption. The irrigation company owned several reservoirs and a system of canals which were operated and maintained by its employees. The company's sole activity was the collection, storage and distribution of water for irrigation purposes to its own stockholders, all of whom were farmers. However, the irrigation company was not a farmer because it did not grow anything and none of its activities was performed on a farm.

This Court noted that "fortunately . . . the . . . Act provides a carefully considered definition" of agriculture. 337 U.S. at 762. The opinion then referred to the two distinct branches of the definition of "agriculture". *Supra*, pp. 26-27. The opinion concluded that the activities of the employees of the company did not come under the first branch of the agriculture definition—the primary meaning of farming in all its branches—because the company "owns no farms and raises no crops" (*id.*, p. 763) and "is not engaged in cultivating or tilling the soil or in growing any agricultural commodity" (*id.*, p. 764). The Court then said concerning the company's irrigation work (337 U.S. at 766):

> ". . . coming to the second branch of the definition of agriculture [the broader meaning] . . . it does con-

totally silent. As to (ix), King Edward's farms and its packing plant are physically separate, but as this Court recognized elsewhere in its opinion in *Wailua*, even if a farmer achieves an "extraordinary degree of specialization" that alone does not deprive him of the exemption. 349 U.S. at 263, 265. *A fortiori* the exemption is not lost by King Edward here, which uses its same working force at both farm and packing plant, merely because the farm and packing plant are physically separate.

stitute a practice performed as an incident to or in conjunction with farming. If the Act exempted all such practices, the company would be exempt. But the exemption is limited. Such practices are exempt only if they are performed by a farmer or on a farm."

The Court added (*id.*, p. 767):

"In the face of this careful use of language, we are required to limit the exemption as Congress intended it should be limited, to practices performed by a farmer or on a farm. In the present case it is clear that the work of the company's employees is done neither on a farm or by farmers."

In the instant case, however, King Edward does raise crops, does cultivate and till the soil, and does operate farms, and consequently the employees, when performing these activities, clearly come within the first branch of the agriculture definition. And the packing plant activities of King Edward, do constitute "practices . . . performed by a farmer . . . as an incident to or in conjunction with" the cultivating, tilling, growing, etc., operations performed by King Edward, and therefore come within the second branch of the agriculture definition. Significantly, note 15 to this Court's decision (*id.*, p. 766) clearly indicates that the processing of agricultural commodities is incidental to or in conjunction with the farming operation by which the commodities are produced. It necessarily follows that the processing by the farmer of commodities produced by the same farmer is incidental to or in conjunction with the farming activities of that farmer, and hence is within the agriculture exemption. That is precisely the situation involved here.[24]

[24] See also the following lower court decisions, which have applied the agriculture exemption to employees engaged in activities other than cultivation of the soil, and notwithstanding the mechanized or industrialized character of the operations involved: *Dumutz* v. *Pinchbeck*, 66 F. Supp. 667 (D. Conn. 1946), 158 F. (2d) 882 (C.C.A. 2) (fireman in greenhouse, where the growing of horticultural products is highly mechanized); *Walling* v. *Rocklin*

E. THE PUBLISHED AND OUTSTANDING ADMINISTRATIVE INTERPRETATIONS OF THE DEPARTMENT OF LABOR ALSO SUPPORT THE EXEMPTION OF KING EDWARD'S PACKING PLANT EMPLOYEES UNDER THE AGRICULTURE EXEMPTION.

In 1939, shortly after the enactment of the Act, the Department of Labor issued *Interpretative Bulletin No. 14* (WHM 35:351 *et seq.*) in which it announced various interpretations of Sections 13(a)(6) and 3(f) and also of Section 7(c) and Section 13(a)(10). The interpretations in *Interpretative Bulletin No. 14* represented the "contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion", and as such are entitled to great weight. *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 549.

Section 10(b) of *Interpretative Bulletin No. 14* set forth the interpretations with regard to the scope of the

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132 F. (2d) 3 (C.C.A. 8) (employees of a florist shop located in a city, packing and selling flowers grown by the employer at its greenhouse several miles away and also some flowers purchased from others); *Miller Hatcheries* v. *Boyer*, 131 F. (2d) 288 (C.C.A. 8)—(employees in an industrialized commercial hatchery located in a city); *Jordan* v. *Stark Bros. Nurseries*, 6 Labor Cases ¶61,468 (W.D. Ark. 1942) (employees of a nursery engaged in transporting trees from the fields where grown to a packing shed of the employer and there sorting, grading and tying the trees into bundles for shipment in interstate commerce); and *Bruno* v. *Hills Brothers Co.*, 7 Labor Cases ¶61,763 (D. Puerto Rico 1943) (employees engaged in canning and packing grapefruit and curing of citron raised by the employer on its own farms). See also *Dofflemeyer* v. *NLRB*, 206 F. (2d) 813 (C.C.A. 9) (agriculture exemption in National Labor Relations Act held applicable to employees of a grape packing and storage plant, owned by three partners, where all the grapes were grown in groves owned by the partnership *or by the individual partners*. By virtue of appropriations acts for the National Labor Relations Board, enacted annually since 1946, the Board and the Courts are required to apply the Fair Labor Standards Act's definition of "agriculture" in cases arising under the National Labor Relations Act).

term "preparation for market", as used in the second branch of the agriculture definition. The term was defined as including various operations performed by farmers to make ready their products for market, such as packing and canning fruits and vegetables, packing and canning dairy products, ginning cotton, manufacturing raw sugar and molasses from sugar cane and also *"handling, drying, bulking, stripping, tying, sorting, stemming, packing, and storing" tobacco.* [Emphasis supplied.] WHM 35:355.[25] It will be noted that many of the operations declared exempt involved a substantial change in the raw or natural state of the agricultural commodities.

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[25] See also the testimony of Administrator Walling before the Senate Committee on Education and Labor on S. 1349, 79th Cong., 1st Sess., page 236 (1945):

> *"Senator Ellender.* Well, then, let me put it this way—I desire to put it in the affirmative now and be more specific—should a large fruit grower have a *processing plant* of his own, and should he *prepare his fruit for market* on his own farm, then neither the present law nor the act we are considering would in any wise affect him?
>
> *"Mr. Walling.* I think that is correct.
>
> *"Senator Ellender.* Suppose, on the other hand, that a few farmers, small farmers, got together and agreed *to purchase machinery for processing their own fruit in the same manner as the large grower does*—would they be covered by the proposed act, or would they be exempt?
>
> *"Mr. Walling.* I think they would be covered insofar as any produce is handled which is not raised on the particular farm. *That is, the exemption goes to the farmer and his employees,* but not to handling of products by someone else, raised by someone else." [Emphasis supplied.]

The distinction thus drawn by the Administrator has been consistently followed by him and the Secretary from the beginning. See also similar testimony by the Department of Labor in *Hearings on H.R. 2033,* House Comm. on Education and Labor, 81st Cong., 1st Sess., p. 79, (quoted *supra*, p. 45), held in 1949 to consider amendments to the Act which later eventuated in the Fair Labor Standards Amendments of 1949. See also p. 97 of such Hearings.

In addition to the interpretations in *Interpretative Bulletin No. 14*, the Administrator and his staff have announced other opinions, which show the operations here in question to be exempt. Thus they have held as follows under Section 13(a)(6):

1. Handling of tobacco at a warehouse by the farmer who grows the tobacco is exempt, including drying, redrying and further processing the tobacco. The exemption is not limited to "first processing" operations, but extends as well to further processing so long as the farmer works upon the tobacco he grows himself. WHM 35:752-753 (Opinion of May 22, 1942).

2. Tobacco stemming by a farmer is exempt. 3 C.C.H. Labor Law Reporter ¶25,242.344 (Opinion of November 16, 1938). This opinion goes far beyond the situation involved here, where the tobacco is merely bulked, sorted, baled and shipped, and is not stemmed, cut or otherwise processed (RK 50).[26]

Furthermore, at one point in this very litigation Petitioner virtually admitted that a tobacco packing plant in the Quincy area engaged in preparing for market only the tobacco that it grew itself was within the agriculture exemption (RB 51, 45). *Supra*, p. 44.[27]

The foregoing interpretations have never been changed by a re-publication of *Bulletin No. 14* or by a press release or by any other means bringing the change to the attention of employers, employees, and the public generally. And unlike the Administrator's report to Congress of a changed interpretation on sugar milling (*Maneja* v.

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[26] Stemming consists of removing the central vein or rib from the tobacco leaf. *Puerto Rico Tobacco Mktg. Coop. Ass'n* v. *McComb*, 181 F. (2d) 697, 698.

[27] The various pertinent administrative interpretations relating to the agriculture exemption, including those referred to in the text, are set forth in Appendix C, pp. 102-108, *infra*.

Waialua Agricultural Company, 349 U.S. 254, 269-270), the Administrator has never advised Congress of any changed interpretation as to tobacco packing and processing. The above interpretations relating to tobacco packing were therefore in effect on the date of the 1949 amendments. See also testimony of the Department of Labor, in hearings preceding such amendments. *Supra*, pp. 45 and 51, note 25. It is significant in this connection that Petitioner's brief is silent as to his administrative interpretations on this matter under Section 13(a)(6). This silence is to be contrasted with his argument that his allegedly changed definition of "area of production" and interpretation of Section 13(a)(10) were "ratified" by the 1949 amendments to the Act (Pet. Br., pp. 32-35, 48-49).

In this case, Petitioner is seeking to overturn such interpretations of almost 17 years' standing concerning the agriculture exemption. He asserts that he no longer agrees with the position stated in his own Interpretative Bulletin and in his other outstanding interpretations. This is the first time that the Secretary or Administrator has sought to enforce the Act with respect to a tobacco packing plant operator who handles and prepares for market only the tobacco that he grows on his own farms.[28] And it is doubtful that the Secretary would have tried to do this,

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[28] Since the original enactment of the Act in 1938 a Federal Wage and Hour Office has been maintained in Florida, manned with personnel engaged in the enforcement of the Act. *Annual Reports* to Congress of the Wage and Hour and Public Contracts Divisions: 1939, Chart XVII, p. 122; 1948, Chart 1, page 3; 1951 p. ii; 1953, p. iii. Frequent inspections have been made through the years of tobacco packing plants in the Quincy area to check on compliance with the Act. At no time until the present case has the Secretary or Administrator sought to enforce the Act with respect to employees of such packing plants, when the plants handle and prepare for market only the tobacco they grow themselves. To the contrary, in administering the Act, the Wage and Hour officials have always treated such employees as exempt.

had he not been so urged by the District Court. (RK 56, 57; see also RK 37).[20]

The Secretary's effort to alter his interpretations radically and to gain judicial justification therefor is contrary to this Court's holding in *Walling* v. *Halliburton Co.*, 331 U.S. 17, 25-26. This Court there declined to depart from a decision rendered under the Act five years before, pointing out that employers had regulated their affairs on the faith of the earlier decision. See also *Miller Hatcheries* v. *Boyer*, 131 F. (2d) 283, where the Eighth Circuit rejected a contention urged by the Administrator as *amicus curiae*, where such contention was contrary to a long-established administrative interpretation, made soon after the Act went into effect and consistently followed, that the operation of a commercial chick hatchery came within the agriculture exemption. And see too *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140, where this Court pointed out that the weight to be given an administrative interpretation under the Fair Labor Standards Act

> "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

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[20] Section 11(a) of the Act gives Petitioner extensive powers of administration, including full investigatory power and including the right to bring injunction suits to restrain violations of the Act. The thoroughness with which these powers of administration have been exercised is attested by the many injunction actions which have been brought. See, for example, the following *Annual Reports* to Congress of the Wage & Hour & Public Contracts Divisions: 1948, p. 37; 1949, pp. 14-15; see also *Annual Report* of Secretary of Labor to Congress for fiscal year 1953, p. 13. These activities contrast sharply with the failure of Petitioner or the Administrator until now to seek to enforce the Act with respect to a tobacco packing plant operator who handles and prepares for market only the tobacco that he grows himself on his own farms.

The interpretation which the Secretary seeks to enforce here is inconsistent with the language of the exemption provision, its legislative history, the case law, and with the continued exemption of processing of other commodities such as fruit packing and canning, canning dairy products, and cotton ginning (*Interpretative Bulletin No. 14*, [1940], *supra*, p. 51), which are much more "industrialized". The Secretary's changed opinion is therefore entitled to no weight.

F. OTHER ERRONEOUS ARGUMENTS OF PETITIONER.

Petitioner seeks to analogize King Edward's packing plant to "redrying plants", which he asserts perform the first off-the-farm operations on non-cigar types of tobacco comparable to the bulking of Type 62 tobacco (Pet. Br., p. 56, note 23).

The analogy is not apt. The position of "redrying plants" in the marketing of tobacco may be briefly described as follows[30]: Flue-cured tobacco, the principal type of tobacco grown in the United States, is cured in curing barns on the farm by applying regulated heat through furnaces and flues built into the barns. The tobacco leaves are then sorted on the farm into lots on the basis of quality and color and taken to auction warehouses for sale. *The sale at auction constitutes the marketing of such tobacco.* The auction method of marketing tobacco applies also to all other types of tobacco *except* cigar leaf tobacco of Georgia and Florida. (*Supra*, p. 25, note 13.

Flue-cured tobacco is delivered by the growers to the auction warehouses with a moisture content of from 20

[30] This description is taken from "*Tobacco Shrinkages and Losses in Weight in Handling and Storage*", U. S. Department of Agriculture, Circular No. 435, July 1937, pp. 6, 9, 10. See also *Yearbook of Agriculture*, 1954 (U. S. Department of Agriculture) p. 430.

to 25 per cent. If packed directly in hogsheads, it would mold. Accordingly, the tobacco is removed from the auction warehouse as soon as the auction sale is made, and delivered to the redrying plant of the buyer, who is commonly a manufacturer. There it is sorted and run through a redrying machine:

> "*Practically all the original moisture is removed in this machine, and a desired amount is added to condition the tobacco for packing without breakage and to allow it to go through the natural fermentation process or sweat while in storage without damage by mold.*" The redrying process also distributes the moisture uniformly." [Emphasis supplied]. *Circular No. 135*, U. S. Department of Agriculture, p. 10.

Thus, "redrying plants" differ in several material respects from King Edward's packing plants. First, the farmer has already marketed his tobacco through sale at the auction warehouse before the redrying plants work on the tobacco. To the contrary, in the case of Type 62 tobacco, as found by the Court of Appeals, the packing plant operations of King Edward are "essential for the marketing of [King Edward's] crops" (RK 93). Second, the redrying plant is operated by the manufacturer who buys the tobacco at the auction warehouse, while King Edward's packing plant is operated by the farmer, King Edward. Third, the natural fermentation process in the case of non-cigar tobacco takes place after the tobacco has been redried, while here the fermentation is merely an extension of the barn-curing process (*supra*, p. 8) and takes place immediately after the tobacco is delivered from the farm to the packing plant.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE EMPLOYEES OF RESPONDENTS KING EDWARD AND BUDD, WHO HANDLE AND PREPARE TOBACCO FOR MARKET AT SAID RESPONDENTS' PACKING PLANTS, ARE ENGAGED IN ACTIVITIES ENUMERATED IN SECTION 13(a)(10); AND THE COURT OF APPEALS ALSO CORRECTLY HELD THAT THE ADMINISTRATOR'S DEFINITION OF "AREA OF PRODUCTION" IS INVALID AS APPLIED TO THE FACTS HERE INVOLVED. ACCORDINGLY, THE COURT OF APPEALS CORRECTLY REVERSED THE DISTRICT COURT AND ORDERED JUDGMENT FOR RESPONDENTS.

Section 13(a)(10) of the Act exempts from the wage and overtime provisions thereof

> "any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products."

In order for an employee to be exempt under Section 13(a)(10) it must appear that: (a) he is engaged in an operation enumerated in the Section, *e.g.*, handling, packing, etc., agricultural commodities, (b) he is performing such operations "for market" and (c) he is so engaged in such operations within the "area of production". As the Court of Appeals held (RK 94-95, RB 163-164), Respondents' employees at their packing plants meet requirements (a) and (b). So far as requirement (c) is concerned, Respondents satisfy the Administrator's definition of "area of production" in regard to mileage distance from the farms where the tobacco is grown, but do not meet the added requirement excluding plants located

in towns with populations of 2500 or more. Respondents contend that the Court of Appeals properly held invalid the population test, as applied to the situation here involved (RK 93, note 7; RB 163, note 7). Accordingly the Court of Appeals correctly reversed the injunctions granted by the District Court and ordered judgment for Respondents.

As to Respondent King Edward, these contentions, in re Section 13(a)(10) are material only if, contrary to our earlier contentions herein, the Court concludes that the employees of King Edward here involved are not exempt under the agriculture exemption provided by Section 13(a)(6).[31]

A. RESPONDENTS' EMPLOYEES AT THEIR PACKING PLANTS ARE ENGAGED IN "HANDLING, PACKING, STORING . . . [AND] DRYING . . . [AN] AGRICULTURAL . . . COMMODIT[Y]" WITHIN THE MEANING OF SECTION 13(a)(10).

1. *The employees are engaged in such operations within the common and technical meanings of such terms and also within the Administrator's published and outstanding interpretations thereof.*

Tobacco is, of course, an agricultural commodity.[32] Hence if the Respondents' packing plant employees are engaged in "handling", "packing", "storing", or "drying" tobacco after it reaches the packing plants from the farms on which it is grown, they are performing operations enumerated in Section 13(a)(10). The only evidence in support of any alleged violation of the Act by King Edward, appearing in a stipulation of the parties, shows that at its packing plant in Quincy here involved,

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[31] The District Court ignored completely Respondents' contentions as to Section 13(a)(10). *Supra*, p. 12.

[32] The Administrator's *Interpretative Bulletin No. 11*, ¶5(b), WHM 35:353, lists tobacco as an agricultural commodity.

King Edward employs many employees engaged in the "handling" of tobacco at wage rates less than 75 cents per hour (RK 16). Thus Petitioner has himself agreed that the employees here involved are engaged in "handling" tobacco, and "handling" is an operation specifically enumerated in Section 13(a)(10).

Elsewhere in the Record, it also appears that the employees at both Respondent King Edward's and Respondent Budd's packing plants are engaged in bulking, shaking, sorting, separating, grading, tying, and baling tobacco. *Supra*, pp. 6-7; RB 141, 142. "Bulking" consists of piling and repiling the tobacco so as to permit it to ferment and dry. This activity extends over a period of some months. As for "shaking", during the bulking period the bulks are taken down from time to time and rebulked. In such process the leaves are "shaken out". "Sorting", "separating", and "grading" consist of dividing the fermented tobacco leaves into different classifications. "Tying" and "baling" consist of tying tobacco leaves together and putting the tobacco into bundles or packages. See pp. 6-7, *supra*, and also RK 92 and RB 42, 56. These operations fall squarely within the ordinary meaning of the terms "handling", "packing", "storing" and "drying" used in Section 13(a)(10).

Webster's New International Dictionary, Unabridged Version, 1955 ed., defines such terms as follows:

> Page 1133—"handling"—"a touching, controlling, managing, using, dealing with, etc., with the hand or hands, or as with the hands . . ."
>
> Page 1750—"packing"—"Act or process of one who or that which packs; esp., the putting up of meat, fruit, etc., for future sale . . ."
>
> Page 1750 "pack" "To . . . to cover, envelop, or protect tightly with something. . . ."
>
> Page 2486 "store" [a verb with "storing" listed as the participle]—". . . to deposit in a store, ware-

house, or other building, for preservation; to warehouse, as to *store* goods. . . ."

Page 793—"dry"—[a verb with "drying" listed as the participle]—". . . . to free or rid from water, or from moisture. . . ."

The operations here involved are not only within the "ordinary" or "common" meaning of the statutory language, but are also embraced in the technical meaning of the language, as understood by growers and agricultural processors. See Briefs for American Farm Bureau Federation and National Grange, *et al.*, *amici curiae* herein. Congress undoubtedly intended that its language comprehend the technical as well as common meanings of the words used. *Cf. Barber* v. *Gonzales*, 347 U.S. 637, 641.

The Administrator's more elaborate definitions of the terms "handling", "packing", "storing" and "drying" are set forth in Appendix D, *infra*, pp. 108-109, and show also that the operations of bulking, shaking, sorting, separating, grading, tying and baling tobacco fall squarely within the language of Section 13(a)(10) describing the operations upon agricultural commodities which are exempt thereunder. Further, the Administrator's *Release, M-12*, issued in February, 1947, described the operations upon tobacco which are enumerated in Section 13(a)(10). See WHM 35:63-64. Such description, set forth in Appendix D, *infra*, p. 110, covers fully the operations performed by the employees here involved.

Petitioner's unsupported statement (Pet. Br., pp. 37-38) that the term "drying" does not include the bulking operation here conflicts with *Interpretative Bulletin No. 14*, ¶32; with the Administrator's Release M-12; and with the uncontradicted facts of record, showing that the bulking operation is indeed a "drying" operation (RK 49, 51, 52; RB 35, 42, 56). See also *Circular No. 249*, U. S. Department of Agriculture, p. 124, quoted at p. 8, *supra*. Thus, the Record shows that the natural internal trans-

formation of the leaf, which starts in the curing barn and continues in the packing plant—

> "is a gradual and continuous process of *drying* and oxidation. . . ." [Emphasis supplied] (RK 51);

and further that

> ". . . the loss of moisture which is more rapid during the period of barn-curing on the farm continues throughout the period of bulk sweating in the warehouse, although at a slower rate. . . ." (RK 52).

And even the expert evidence, upon which Petitioner relies so heavily, shows that in the packing plant—

> "there is also a notable loss of moisture in the fermentation which often exceeds the loss in dry matter" (RK 27).

See also *"Tobacco Shrinkages and Losses in Weight in Handling and Storage"; Circular No. 433*, U. S. Department of Agriculture, pp. 30, 31, which shows that when the tobacco is first placed in the bulks, its moisture content ranges from 24 to 32 per cent, while subsequent to bulking the moisture content ranges from 18 to 20 per cent.

Petitioner's statement (Pet. Br., p. 38) that the moisture content of the tobacco is almost the same after bulking as before, finds no support in the Record. The expert evidence, as Petitioner agrees elsewhere in his brief (p. 5), shows only that the "initial content of moisture" in the bulk varies from 20 to 30 per cent, with a content of 25 per cent required for best results in the subsequent bulking (RK 24).

Petitioner's purported 1948 change in the interpretation concerning Section 13(a)(10) (Pet. Br., pp. 48-49) is discussed hereinafter, pp. 71-72.

2. *The decided cases also show that the employees here involved are engaged in performing operations enumerated in Section 13 (a)(10).*

While there have been no decisions of this Court dealing with the problem, the lower court decisions support Respondents' position concerning the scope of the Section 13(a)(10) exemption. See *Puerto Rico Tobacco Marketing Cooperative Ass'n. v. McComb*, 181 F.2d 695, 698-699, 701-702 (C.C.A. 1) —exemption held applicable to employees of a cooperative association in Puerto Rico, engaged at several warehouses in operations identical with those of Respondents herein, namely, grading, weighing, bulking and packing (prior to fermenting) cigar leaf tobacco grown by the cooperative's 7,000 members; *Oppenheimer v. Alvarez & Co.*, 6 Labor Cases ¶61,248 (D.P. Rico 1942) —exemption held applicable to operations of grading, fermenting, storing and otherwise preparing for market cigar leaf tobacco at warehouses operated by an independent company, which bought the tobacco from farmers and transported it to the warehouses; *Sanabria v. Valicate & Co.*, 5 Labor Cases ¶62,643 (D.P. Rico 1945) —exemption held applicable to employees engaged in handling, receiving, drying, fermenting, bulking, sorting, stripping, grading, packing and storing cigar leaf tobacco at a packing establishment to which tobacco was brought from nearby farms, such operations being necessary for the preparation for market of such leaf tobacco; *Rodriquez v. Colon*, 4 Labor Cases ¶69,381 (D.P. Rico 1941) —same; *Maestre v. Cooperativa Cafeteros*, 6 Labor Cases ¶61,513 (D. P. Rico 1943) —exemption held applicable to employees of a company engaged in roasting, grinding, and packing and canning coffee; *Flemind v. Farmers Peanut Co.*, 128 F.(2d) 404, 407 (C.C.A. 5) —exemption held applicable to operations of shelling peanuts and cleaning the shelled peanuts; *Holt v. Barnesville Farmers Elevator Co.*, 145 F.(2d) 250 (C.C.A. 8), *cert. den.* 324 U.S. 858 —exemption held applicable to grain elevator employees engaged in receiving, weighing, testing, grading, cleaning, storing and loading grain into railway cars for shipment; *Tobin v. Flour Mills of America*, 185 F.(2d) 596, 602 (C.C.A. 8) —same;

even though the grain elevators were owned by a company which milled some of the grain into flour before marketing it; *Stephens v. Cotton Producers Assn.*, 117 F. Supp. 547 (N.D. Ga. 1953) (exemption held applicable to a truck driver employed by a company which sold chickens on behalf of farmers, who transported such chickens from farms to a nearby poultry processing plant, notwithstanding the chickens were there slaughtered, cleaned and dressed).

3. *Erroneous arguments of Petitioner.*

a). Petitioner argues (Pet. Br., p. 40) that tobacco bulking is a "manufacturing operation" in the course of which the tobacco is very substantially "changed from its 'raw or natural state'" into an industrial product and is no longer an "agricultural or horticultural commodity". The Court of Appeals rejected this argument, stating:

> "The legislative history of Section 213(a)(10) makes clear that its primary purpose was to prevent discrimination against the small farmer. When it is considered that admittedly the processing was essential for the marketing of the tobacco, again it seems clear to us that the employees of all the appellants are exempt under Section 213(a)(10)." (RK 94-95, RB 163-164).

Petitioner's argument, moreover, conflicts with the statutory language, the legislative history underlying Section 13(a)(10), and the facts of Record.

The words "in their raw or natural state" in Section 13(a)(10) are not separated by a comma from the word

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Petitioner seeks to convey the impression that Respondents' packing plant operations are complex, extensive and industrial (Pet. Br., pp. 37-40). The facts of Record show otherwise. *Supra*, pp. 7, 16. In any case, Petitioner has himself admitted that operations may be exempt under Section 13(a)(10), even though they are complex and industrial, *e.g.*, packing and drying fruits (*Interpretative Bulletin No. 4*, ¶¶27, 32, Appendix D, p. 109 *infra*).

"preparing" but come immediately after that word. Hence, they modify only that word and not the words with which we are here concerned; namely, "handling", "packing", "storing", and "drying". If, therefore, an employer is in fact performing any of these operations upon an "agricultural commodity", he is performing an operation enumerated in Section 13(a)(10) whether or not such commodity is then in its raw or natural state.

Petitioner virtually concedes (Pet. Br., p. 40) that the "raw or natural state" limitation in Section 13(a)(10) applies only to the activity of "preparing". He argues, however, that such limitation is inherent in the term "agricultural or horticultural commodities". But if this were true, Congress would not have included the limitation expressly as to the single activity of "preparing" and have omitted it as to all the other activities enumerated in Section 13(a)(10).[51]

Petitioner's argument as to the meaning to be ascribed to the term "agricultural . . . commodities" is also directly contrary to the legislative history of Section 13(a)(10). That history, reviewed *infra*, pp. 67, 82-88 and Appendix E, pp. 111-119, shows that as the exemption was first introduced in the Senate, it was limited to the operations of preparing, packing and storing fresh fruits and vegetables in their raw or natural state (81 Cong. Rec. 7870, 7949). Later, the exemption was broadened to include these operations upon all *agricultural commodities* in their raw, natural or *dried* state (82 Cong. Rec. 1783, 1784; H. Rept. No. 2182, 75th Cong., 3d Sess., p. 2). And finally, it was broadened still further by the adoption in the House of the so-called Bloom amendment, which

[51] Petitioner's suggestion (Pet. Br., p. 41, note 16) that Congress' failure to have the "raw or natural state" limitation modify all of the preceding operations in Section 13(a)(10) was "inadvertent" is clearly inconsistent with the legislative history of Section 13(a)(10). *Infra*, pp. 69-82-88, 111-119.

contained language very much like that in Section 13(a)(10) as finally enacted. 83 Cong. Rec. 7401, 7407-7408. In the face of this history which shows that Congress started with a narrow exemption limited to operations upon fresh fruits and vegetables in the raw or natural state and continuously broadened the exemption as the bill worked its way through to passage, no basis exists for restricting the phrase "agricultural commodities" to the narrow meaning which Petitioner would ascribe to it. In the absence of any special statutory definition, the phrase should be given its commonly understood meaning. *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 618. Within such common meaning, tobacco, although fermented, is still an agricultural commodity.

Petitioner's argument is also in conflict with the purpose of Section 13(a)(10) to exempt workers "engaged in *processes* necessary for the marketing of agricultural products" (*Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 612) and particularly the "first processing of things that come off the farm" (83 Cong. Rec. 7409, *infra*, pp. 69, 86, 116).[23] As held by the Court of Appeals below (RK 94), the packing plant operations here are necessary before the type tobacco involved can be marketed, and they constitute "first processing" operations performed upon the tobacco after it comes from the farm. Consequently, a holding that the exemption does not apply because the tobacco is not in its "raw or natural state", when worked on in the packing plant, would deny the exemption to all tobacco packing plants handling this particular type of tobacco. This would clearly violate the Congressional purpose.

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[23] The dissenting opinion in *Holly Hill* also notes, concerning the operations included in Section 13(a)(10): "All can be done on the farm and frequently are done there, but may be done elsewhere, often in factories. All consist in the first stages of preparation for market". 322 U.S. at 626.

But even if the "raw or natural state" limitation applies to the operations here in question and if tobacco is deemed an "agricultural commodity" only if it is in its raw or natural state, the Record establishes clearly that the activities of the employees here involved are still within Section 13(a)(10). The only case in point holds that the fermenting of cigar leaf tobacco through the bulking process at tobacco packing plants does not change the "raw or natural state" of the tobacco. *Puerto Rico Tobacco Marketing Coop. Ass'n.* v. *McComb*, 181 F.(2d) 697, 702 (C.C.A. 1). And the U. S. Court of Appeals for the Fifth Circuit has said that "raw" as used in Section 13(a)(10) means "uncooked", and that a "natural" state is one that has not been artificially changed. *Fleming* v. *Farmers Peanut Co.*, 128 F.(2d) 404, 407. The fermentation of tobacco there is not a cooking process nor does it involve any artificial change in the tobacco. The chemical changes within the tobacco occurring in fermentation are but natural and spontaneous changes within the tobacco leaves, without the addition of external elements or chemical catalysts. Actual fermentation of tobacco leaves may in fact be likened to ripening of fruit, which also produces chemical changes. Yet surely no one would contend that the ripening of fruit at a plant, to which the farmer's product is taken, so changes the fruit's raw or natural state that the operations involved in ripening do not fall within Section 13(a)(10). See in this connection the *Puerto Rico Tobacco Marketing Coop.* case, cited *supra*.

b). Petitioner's brief (pp. 42-44) erroneously relies upon the Congressional rejection of amendments exempting tobacco auction warehouses. The amendment introduced on this subject in the Senate was a self contained amendment providing exemption from the operation of the entire statute rather than directed to the "area of production" exemption (81 Cong. Rec. 7878; Pet. Seq. App., p. 100). And, in the House the only amendment of those referred to by

Petitioner, which was directed to that exemption, was that offered by Congressman Cooley on May 24, 1938 (83 Cong. Rec. 7408; Pet. Sep. App., p. 125), after the House had already adopted the Biermann amendment as a substitute for such exemption as reported in the House. *Infra*, pp. 85-86, 115-119. Hence, contrary to Petitioner's assertion (Br., pp. 19, 52) neither the Senate nor House amendments referred to by him were offered as "amendments to" the provision which subsequently became Section 13(a)(10). Furthermore, operations in tobacco auction warehouses do not involve Type 62 tobacco and are distinguishable, legally and functionally, from the bulking operations here presented. *Supra*, p. 35, note 18. Non-cigar tobacco is marketed by the farmer through such auction warehouses immediately after curing and grading in the barn on the farm. Following the auction sale, such tobacco is shipped to re-drying plants operated by the purchaser. See pp. 55-56, *supra*. In contrast, Type 62 tobacco "cannot be graded until it has been processed" in the packing plants and "there is no market at an earlier stage for this type tobacco". Consequently, the operations in the packing plant on Type 62 tobacco are essential to prepare it for market (R. 162, 164; RK 92, 94). Accordingly, as Petitioner concedes (Br., pp. 43-44), the amendments relating to auction warehouses, even if adopted, would not have applied to the packing plants here involved. Moreover, the Administrator himself reported to Congress on January 3, 1949 that employees in "tobacco-auction warehouses" were exempt from minimum wage and overtime requirements by reason of section 13(a)(10)—presumably if they were within the area of production. See *1948 Annual Report of Walsh-Healey and Public Contracts Divisions, U. S. Department of Labor*, p. 125, table 23.

Nor can Respondents' plants be likened, as Petitioner suggests (Pet. Br., p. 38) to redrying plants. We have previously pointed out, pp. 55-56, *supra*, the essential differences between Respondents' plants and redrying plants. Moreover, even as to redrying plants, Petitioner's statement that the inapplicability of Section 13(a)(10) to such plants has long been accepted by the industry, is open to question. The Administrator, in his findings published in connection with his "area of production" definitions, recognized that such plants do perform operations described in Section 13(a)(10), for in such findings he referred to the fact that representatives of the tobacco redrying industry had opposed a mileage criterion (Pet. Sep. App., p. 47). If redrying plants do not perform operations in Section 13(a)(10), it would have been unnecessary for the Administrator to discuss their opposition to a mileage test or any other test in the "area of production" definition.

Petitioner also relies upon the fact that Congress ultimately included in Section 13(a)(10) specific mention of "ginning and compressing", while it did not mention tobacco processing (Pet. Br., pp. 44-45). This argument begs the question. We contend that the operations here involved are embraced by the words "handling", "packing", "storing" and "drying" "agricultural . . . commodities". Petitioner does not disprove our contention by pointing out that other words in Section 13(a)(10) exempt other operations. In this connection it will be observed that "cheese or butter or other dairy products" are the only agricultural or horticultural commodities mentioned in terms in Section 13(a)(10). All other agricultural or horticultural commodities, whether they be cotton, tobacco, fruits or vegetables, eggs, nuts, etc., are included generally in the term "agricultural or horticultural commodities" and operations thereon are exempt or non-exempt depending upon the operation in question.

Petitioner also relies upon the omission from Section 13(a)(10) of the word "processing". (Pet. Br., pp. 47-48). But Congressman Biermann, the sponsor of Section 13(a)(10), clearly explained why the word "processing" was excluded:

> "In an amendment I inserted in the Record yesterday I included the word 'processing'. I call attention to the fact that in the pending amendment this word is stricken out. *I struck it out for the reason that some Members thought that processing would include the making of cotton and wool into textiles, and rubber into finished products, and a long list of things of that kind. The amendment I have offered includes only the first processing of things that come off the farm*". [Emphasis supplied]. (83 Cong. Rec. 7401).

Plainly then the omission of the word "processing" was simply to make sure that manufacturing operations were excluded from Section 13(a)(10). It was not intended to preclude the exemption of operations such as those here involved which are covered by other words in Section 13(a)(10), designed to embrace "the first processing of things that come off the farm". Furthermore, this Court itself referred to Section 13(a)(10) as providing an exemption for "various processing operations." *Walling*, 349 U.S. at 267.

c). Petitioner argues that since the operations here involved constitute first processing within the meaning of the limited overtime exemption granted by Section 7(c), they cannot be deemed included under Section 13(a)(10). (Pet. Br., pp. 46-48).

But if these are "first processing" operations, then as stated by Congressman Biermann, they were intended to be wholly exempt under Section 13(a)(10). *Infra*, pp. 86, 116. Furthermore, there are many operations which Section 7(c) specifically exempts and which Section 13(a)(10) also specifically exempts, *viz.*, the ginning and compressing of cotton, the first processing

of milk into dairy products, and the first processing (including drying—see *Interpretative Bulletin No. 11*, 13 WHM 35:359), canning or packing fresh fruits or vegetables. True, the Section 7(c) exemption for these operations is not restricted to employees employed "within the area of production"; but to the extent that employees are engaged in these operations within the "area of production", it is plain that the Sections 7(c) and 13(a)(10) exemptions overlap.

As the Court below stated:

> ". . . we agree with the Ninth Circuit that such exemptions [Sections 7(c) and 13(a)(10)] overlap and are not alternative or mutually exclusive. *Waialua Agricultural Co.* v. *Maneja*, 9th Cir., 178 F.(2d) 603, 609" (RK 95).

In his findings preceding the issuance of his area of production definitions, the Administrator pointed out that many establishments did not need any Section 13(a)(10) exemption because "most affected industries have 14 weeks, 28 weeks and in some instances year-round exemptions from overtime under other provisions of the Act" (Pet. Sep. Apps. pp. 13-14, note 1.) The Administrator was here plainly referring to Section 7(c) of the Act, thus again recognizing that Sections 13(a)(10) and 7(c) do overlap. And in his *1948 Annual Report* to Congress, pp. 124-128, the Administrator stressed such overlapping, including overlapping as to operations on tobacco (Table 24, pp. 126-127). In his *1950 Annual Report*, p. 288, he again recognized such overlapping.

With respect to the part of Section 7(c) which is restricted to employees within the "area of production", namely, first processing of agricultural commodities, that exemption and the exemption in Section 13(a)(10) overlap in many respect besides tobacco. Thus, for example, the drying of furs or hay is the first processing of an agricultural commodity within the meaning of Section 7(c) and also constitutes the drying of an agricultural

commodity within the meaning of Section 13(a)(10). *Interpretative Bulletin No. 14*, ¶¶ 20, 32.

d). Petitioner contends that his interpretation, which he terms of long standing, was ratified by the 1949 amendments to the Act (Pet. Br., pp. 48-49). This contention is wholly without merit.

First, unlike the situation referred to in *Wirtz* 349 U.S. at 269-270, where the Administrator reported to Congress a *changed* interpretation in the agriculture exemption concerning milling of sugar cane, and Congress took no action with respect to such changed interpretation, the interpretation of Section 13(a)(10) which the Petitioner advances here was never reported to Congress.

Second, as late as 1948, the Administrator submitted a chart to a Senate Labor Subcommittee defining the term "drying" in Section 13(a)(10) as "lowering moisture content of agricultural commodities such as fruits, vegetables, hay, and unstemmed tobacco by exposure to heat or by natural methods." *Hearings on S. 49*, Senate Comm. on Labor and Public Welfare, 80th Cong. 2d Sess., p. 86; WHM 35:715,719. And the Administrator's *Annual Report* for *1948*, transmitted to Congress on January 3, 1949, described the term "handling" in Section 13(a)(10) as including "assembling, binning, piling, stacking" (Table 24, p. 196). Neither of these submissions to Congress in 1948-1949 questioned that tobacco bulking was embraced in the exemption.

Petitioner asserts (Pet. Br., p. 48, note 19) that while there may have been some confusion in the original interpretation issued in August, 1939 (*Interpretative Bulletin No. 14*), subsequent published interpretations made it clear that tobacco bulking was not regarded as an operation exempt under Section 13(a)(10). He refers in this connection to a Department of Labor document entitled "Area of Production Tobacco", dated December

1944, but he gives no citation of where it may be found. If it was issued, it was not by any means called to the attention of employers, employees and the public generally. Moreover, in *Release M-12*, quoted *infra*, Appendix, D, p. 110, issued in 1947, and in the testimony, charts or reports in 1948-1949 above described, the Administrator indicated that the operations here involved are among those which are enumerated in Section 13(a)(10). The interpretation which Petitioner now advances was published no earlier than November 1948, and then only as an indirect comment in a changed regulation directly concerning Puerto Rico tobacco (Pet. Br., p. 49).[36] Even this comment was never reported to Congress by testimony or annual report. In these confused circumstances, Congress can hardly be said to have ratified the alleged change in the Administrator's long-standing interpretation to the contrary.

Third, Congress considered Section 13(a)(10) in its 1949 review of the Act only in connection with the problem of defining the "area of production" and not in connection with the problem of what activities are exempt under Section 13(a)(10). See conference report on 1949 Amendments, *H. Rep. No. 1453*, 81st Cong., 1st Sess., p. 28; Pet. Sep. App., pp. 133-153. For this reason also, Congress cannot be deemed to have ratified the administrative construction of the activities included in Section 13(a)(10).

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[36] Prior to November 1948, or for some ten years after the law was enacted, the Administrator had outstanding a special definition of "area of production" for Puerto Rican leaf tobacco, wherein the operations of bulking and fermenting tobacco were considered operations described in Section 13(a)(10). 3 CCH Labor Law Reporter, ¶23281, note 1.

B. RESPONDENTS' EMPLOYEES AT THEIR PACKING PLANTS ARE ENGAGED IN HANDLING, PACKING, STORING, AND DRYING AN AGRICULTURAL COMMODITY "FOR MARKET".

The District Court found that the activities taking place in the Respondents' packing plants were to "ready [the tobacco] *for market*" (RK 58, RB 148) and constitute preparing the tobacco "for market" (RK 59, RB 148) [Emphasis supplied]. The Court of Appeals also found that such packing plant activities were "essential for the *marketing* of their [the farmers'] crops" and constituted "preparation for market" (RK 93, 94; RB 163, 164) [Emphasis supplied]. Moreover the undisputed facts in the Record show that all of the tobacco prepared at the packing plants by Respondents' employees is sold to cigar manufacturers (RK 49, RB 60). Clearly then, the work of the employees at the packing plants upon the tobacco is "for market" within the meaning of Section 13(a)(10). See *Tobin* v. *Flour Mills of America*, 185 F.(2d) 596, 602 (C.C.A. 8) and *Stephens* v. *Cotton Producers Ass'n.*, 117 F. Supp. 517, 522-523 (N.D. Ga. 1953).

C. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE ADMINISTRATOR'S DEFINITION OF "AREA OF PRODUCTION" IS INVALID AS APPLIED TO THE FACTUAL SITUATION HERE TO THE EXTENT THAT IT EXCLUDES THE TOWN OF QUINCY, FLORIDA; AND SINCE THE RESPONDENTS' EMPLOYEES HERE INVOLVED ARE OTHERWISE WITHIN THE SECTION 13(a)(10) EXEMPTION, THE COURT PROPERLY ORDERED JUDGMENT FOR RESPONDENTS.

1. *The population requirement in the definition is an invalid non-geographic limitation as here applied.*

The Administrator's authority under Section 13(a)(10) to define "area of production", and thus to draw the lines for the exemptions granted by that section, must be exercised within the limits laid down by Congress. The courts,

for example, will not enforce his definition if he includes therein non-geographic limitations. *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 618-619.

The Administrator's definition of "area of production" as used in Section 13(a)(10) is set forth in Appendix A, *infra*, pp. 96-98. Under such definition a tobacco packing plant is within the "area of production" if (a) 95 per cent of its tobacco comes from farms or farm assemblers located not more than 50 airline miles from the packing plant, and (b) the packing plant is located in a town of under 2500 population and more than 1 airline mile of any city or town with population ranging from 2500 to 49,999, more than 3 airline miles of any city or town with population ranging from 50,000 to 499,999, and more than 5 airline miles of a city with a population of 500,000 or greater. Respondent King Edward's packing plant draws all of its tobacco from farms not more than 13 miles away and Respondent Budd's packing plant draws all of its tobacco from farms not more than 30 miles away, *supra*, pp. 6, 10, and thus satisfy the first of the requirements in the Administrators' definition. This is indeed a geographic requirement. Respondents do not satisfy the second requirement, however, because they are located in Quincy, a town of over 2500 population.

We submit, however, that as applied here such second requirement is a non-geographic limitation, which is unauthorized by Congress. Not only has the court below thrice held the population limitation to exceed the Administrator's authority,[37] but other lower courts also have held invalid a like population limitation in an earlier "area of production" definition.[38]

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[37] RK 93; RB 163; *Jenkins* v. *Durkin*, 208 F.(2d) 941, 945; *Lovorn* v. *Miller*, 215 F.(2d) 601.

[38] *Lake Wales Citrus Growers Ass'n.* v. *Andrews*, 1 Labor Cases ¶18,429 (S.D. Fla. 1939) *rev'd.* on other grounds 110 F.(2d) 653 (C.C.A. 5); *Fleming* v. *Farmers Peanut Co.*, 37 F. Supp. 628

In *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, this Court considered the validity of the Administrator's "area of production" definitions. At that time there were two alternative definitions. One definition included individuals within the "area of production" if they were employed in an establishment located outside any town or city of 2500 or greater population and the establishment obtained all of its products from farms within ten miles. The other definition required that the establishment employ not more than seven employees and that it obtain all of its materials from farms in the general vicinity. This Court found it unnecessary to pass upon the validity of the population limitation in the first of the two definitions because the Company's canning plant there involved was in a town of under 2500 and therefore met the limitation. The Company was not exempt under the first definition, however, because some of its products came from beyond ten miles of its plant. 322 U.S. at 610-611.

As for the second definition the Court struck down as unauthorized the number-of-employees limitation. 322 U.S. at 618. It said in that connection that Congress

> ". . . restricted the Administrator to the drawing of geographic lines, even though he may take into account all relevant economic factors in the choice of areas open to him". 322 U.S. at 619.

As pointed out by Judge Pickett, dissenting in *Tobin* v. *Traders Compress Co.*, 199 F.(2d) 8, 12 (C.C.A. 10), *cert. den.*, 344 U.S. 909, *reh'g. den.* 344 U.S. 931,[39] this

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(M.D. Ga. 1941) *aff'd.* on other grounds 128 F.(2d) 404 (C.C.A. 5); *Clark* v. *Jacksonville Compress Co.*, 45 F. Supp. 43 (E.D. Tex. 1941).

[39] In the *Traders Compress* case the Court of Appeals for the Tenth Circuit upheld the validity of the present "area of production" definition as applied to a cotton compress establishment located in a city of over 30,000 and drawing a substantial percentage

means that the Administrator may take into consideration "all relevant economic factors" necessary to determine the geographic lines of the area of production. But where, as here, a plant is within the geographic lines established, no reasonable basis exists for discriminating against it because it is located in a town of 2500 or more population.

2. *The Record shows that Respondents' packing plants are geographically within the "area of production" of Type 62 tobacco.*

The facts here establish clearly that Respondents' packing plants are within the geographic lines of the "area of production" for Type 62 tobacco, under any rational definition of that term. Quincy, where the plants are located, is a small agricultural community of some 6500 and the plants draw all their tobacco from farms in an immediately adjacent and compact area, not more than 30 miles distant from the packing plants. Furthermore, 60 per cent of the five million pounds of tobacco grown annually in that area are bulked in the tobacco packing plants in Quincy. And still further, 60 per cent of all Type 62 tobacco grown in Gadsden County, Florida, where Quincy is located, is processed in tobacco packing plants in Quincy, and largely by the same employees who grow it. *Supra*, pp. 9, 10, 11; RB 36. There is other evidence as well, of which this Court will take judicial notice, that Quincy is in the very heart of the growing area of U. S. Type No. 62 tobacco. See the U. S. Department of Agriculture map reproduced on the opposite page, and also that Department's definition of the term

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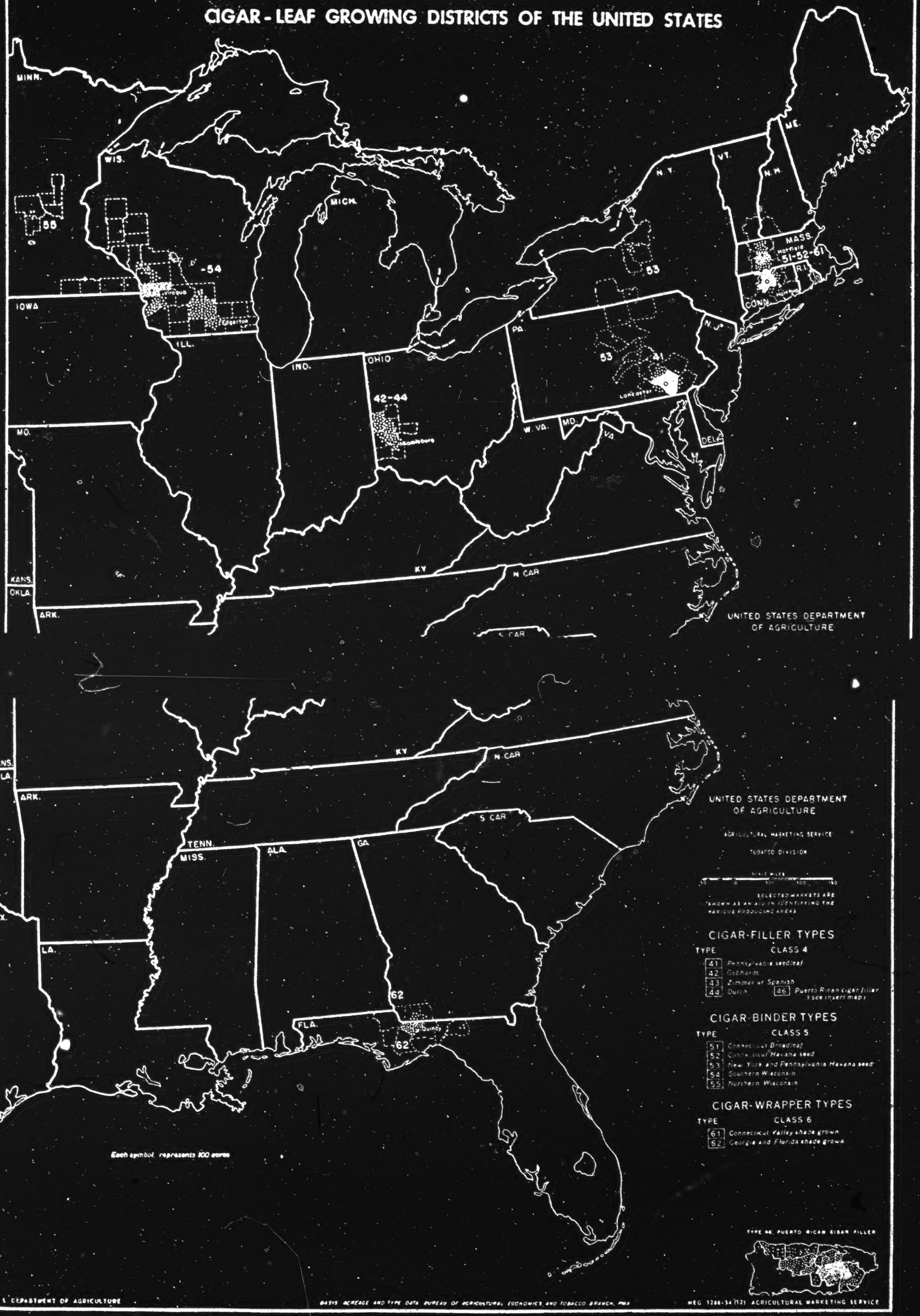
of its cotton from distances of more than 50 miles—in fact up to 250 miles. See the District Court decision in that case at 107 F. Supp. 354, 358-359 (E.D. Okla.). That case is thus clearly distinguishable on its facts from the situation here. *Cf. Armour* v. *Wantock*, 323 U.S. 126, 132-133.

TOBACCO

CIGAR - LEAF GROWING DISTRICTS OF THE UNITED STATES



Map reproduced from Statistical Bulletin No. 157, U. S. Dept. of Agriculture, Annual Report on Tobacco Statistics, 1954, p. 8.

"production area" for Type 62 tobacco in a marketing order regulating the handling of such type tobacco pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (48 Stat. 31, as amended; 7 U.S.C. Sec. 601 *et seq.*). The Secretary of Agriculture's definition includes in such "production area" those counties bordering the Georgia-Florida state line and lying between the Suwanee River on the east and the Flint and Apalachicola Rivers on the west. 17 Fed. Reg. 3509; see also 17 Fed. Reg. 3501 and 3502 (April 19, 1952).[40] Gadsden County in Florida is but one of such counties.

In the light of these facts the court below correctly observed

> "It seems particularly clear that the Administrator did exceed his authority as to the area of production involved in this particular case" (RK 93, note 7; RB 163, note 7).

Assuming *arguendo* the propriety of a population limitation in the area of production definitions, the Administrator exceeded his authority when, in the light of the foregoing facts, his population limitation was made so inflexible as to exclude Respondents' packing plants in Quincy.[41] The facts in this case show plainly the neces-

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[40] Petitioner suggests (Pet. Br., p. 34) that Congress, when considering the 1949 Amendments to the Act, could easily have advised the Administrator to adopt the Secretary of Agriculture's definition. But since that definition applied only to Type 62 tobacco, and there are many other types of tobacco as well as hundreds of other agricultural commodities, this suggestion is hardly feasible.

[41] Petitioner relies upon the various hearings and conferences held by the Administrator before promulgation of the present "area of production" regulations in 1946 (Pet. Br., p. 24). Petitioner admits however, that its records do not show that any of the producers of Type 62 tobacco appeared at any hearing; that any evidence was taken pertaining to the growing of such tobacco; or that the Administrator had any evidence specifically in connection with Type 62 tobacco (RB 50). The problems of Type 62 to-

sity for a deviation from the inflexible 2500 population test for Type 62 tobacco, just as the Administrator's area of production definitions recognized the need for and established different mileage limitations for different commodities and different operations, and varying distances from populated places varying with the size of population. (Appendix A, pp. 96-98, *infra*).[42] Whatever the validity of the 2500 population test in distinguishing for some purposes between rural and urban areas, it should not be established inflexibly to exclude from the "area of production" plants such as Respondents' which by all other criteria are clearly within the area of pro-

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bacco were not specifically heard by the Department of Labor until after suit was commenced against the independent packer, Budd, in February 1951 (RB 146; Pet. Br., pp. 25-26; see also U. S. Department of Labor, Wage and Hour and Public Contracts Divisions, "In the Matter of the Amendment of the Definition of 'Area of Production' As Used in Sections 7(c) and 13(a)(10) of the Fair Labor Standards Act, As Amended", Volume II, pp. 356, *et seq.* (April 4, 1951). And even at that time, the Administrator simply took the erroneous position that he did not have to concern himself with Type 62 tobacco because the bulking operations here involved are not among those enumerated in Section 13(a)(10). See *Report and Recommendations of Presiding Officer*, U. S. Department of Labor, Wage and Hour Division, G-617, p. 7, dated June 9, 1954:

> ". . . the Administrator's position [is] that the 'bulking' of cigar leaf tobacco is not among the operations enumerated in Section 13(a)(10). Under these circumstances, regardless of the definition of 'area of production', the Administrator is without authority to consider employees engaged in bulking [Type 62] cigar tobacco exempt under Section 13(a)(10)."

[42] In such definitions, the mileage limitation as to ginning cotton is 10 miles; as to operations on fruits and vegetables, 15 miles; as to storing cotton, 20 miles; as to compressing cotton and operations on tobacco, grain, soybeans, poultry and eggs, 50 miles; and as to operations on other unspecified commodities, 20 miles.

The definitions also exclude from the "area of production" any operation within 1 mile of a city, town, or "urban place" having 2500 or more population; within 3 miles of such place having 50,000 or more population; and within 5 miles of such place having 500,000 or more population.

duction of Type 62 tobacco. The tobacco packing plants in the Quincy area employ 1636 workers (RK 84A, 86).[43] The town must have retail stores, service establishments, and public facilities to meet the requirements of these employees, and so Quincy's population exceeds 2500.[44] But this should hardly be sufficient reason for excluding plants in that town from the area of production of Type 62 tobacco, when all other facts point to Quincy's being squarely within such area.

3. *The Record also shows that the population requirement has the effect of defeating the purpose underlying the "area of production" exemption.*

The Record convincingly demonstrates that the population limitation in the regulation as here applied thwarts the Congressional purpose in enacting the "area of production" exemption. This Court pointed out in the *Waialua* case that

> "This exemption was designed to meet the protests of many legislators who argued that the broad agriculture exemption permitted large farming units to process their own products without subjecting themselves to the terms of the Act, while the small farmer,

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[43] As the Record shows (RK 84A), 15 packing plants are located in the Quincy area; 11 are in Quincy, 3 on farms and 1 in Madison, Florida, which has a population of 3,150 according to the 1950 U. S. Census. Hence, a redefinition of "area of production" that included Quincy and Madison within the "area" would exempt fewer than 1,600 employees, since those working in packing plants on farms are probably already within said "area".

[44] *Cf. Maneja* v. *Waialua Agricultural Company*, 349 U.S. 254, 258, in which the large Hawaiian sugar plantation there involved had built on its plantation a village to serve the needs of the required number of plantation employees and their families. Over 3000 persons lived in this village which contained dwelling houses and also the usual retail and service establishments as well as public services. The entire plantation, including the village, was within the city limits of Honolulu. See the Record in that case, No. 357, October Term 1954, pp. 118-122, 31.

> *who did not have the equipment necessary for such processing*, had to bear the cost of operations covered by the Act" [Emphasis supplied]. 349 U.S. 254, 268.

As found by the Court of Appeals, many small farmers in the Quincy area grow less than 25 acres of Type 62 tobacco per year. And this is insufficient for them to process their own tobacco; accordingly they have it prepared for market by an independent company, *e.g.*, Budd (RB 162, 36). This is precisely the type of case to which Congress intended to accord an exemption under Section 13(a)(10). Since the population limitation in the Administrator's definition has the effect of denying the exemption in the situation here which was plainly embraced by the Congressional intent, such limitation was properly invalidated by the court below.

The Administrator himself has recognized that the purpose of Section 13(a)(10) does not require the inclusion in the "area of production" definition of any population limitation. Thus, both in the original definition promulgated in 1938 and for six years from 1941 to 1947, the "area of production" was defined solely in terms of a number of employees limitation, although for the period 1939-1940 the definition included a population limitation. (*Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 609-610; 1941 *WH Man.*, pp. 306-309; Pet. Sep. App., pp. 10-11). Effective in 1947 (11 Fed. Reg. 14648), however, the population limitation was abandoned, as Petitioner states (Pet. Sep. App., p. 11)

> "when industry representatives protested that it resulted in numerous competitive inequalities and economic discriminations between establishments located within the 'area of production' as so defined, and those outside the 'area of production'."

It was not until after this Court in the *Holly Hill* case struck down as invalid the number of employees limitation in the definition that the Administrator once again

included a population limitation in the definition (Pet. Sep. App., pp. 10 *et seq.*), although he continued to believe such limitation created economic discriminations and competitive inequalities which were basically unfair. Pet. Sep. App., pp. 39-40; *Hearings on S. 49* and other bills, Sen. Comm. on Labor & Public Welfare, 80th Cong., 2d Sess., p. 82; Administrator's *Annual Report* to Congress, 1954, pp. 36-38. Since the Administrator deliberately reinserted a population limitation in the definition in the circumstances above explained, he had the burden of providing such flexibility in the population limitation as to avoid gross discriminations which Congress had never authorized. Certainly that burden has not been sustained herein. *Cf. Secretary of Agriculture et al. v. United States*, 350 U.S.—(decided January 9, 1956), 24 LW 4039.

Furthermore, the petition for certiorari herein (pp. 14-15) stresses the competitive disparities between processing establishments in different circuits, which uphold or invalidate the population test. Here, however, Petitioner condones the extraordinary situation that would be created in the small town of Quincy, where the farmer packing his own tobacco in that town is exempt under Section 13(a)(6), if the independent packer down the street, packing the tobacco of numerous nearby small farmers, were not exempt under Section 13(a)(10). The District Judge recognized the disastrous consequences of this result for the small farmers (RK 37, 56-57; RB 146-147), but attempted to resolve the disparity by denying exemption even to the farmer-packer, contrary to the clear mandate of Sections 13(a)(6) and 3(f) (RK 37, 56-57, 59-60; RB 146-147, 149-150). The Court of Appeals properly reversed this attempt to avoid erring under one exemption by erring under another. The Court of Appeals construed each exemption in the only way possible to effectuate the Congressional mandate as to both exemptions (RK 93, 94, note 8; RB 163-164, note 8).

Petitioner argues (Br., pp. 32-35) that Congress in effect approved the Administrator's definition of "area of production" by failing to amend Section 13(a)(10) in 1949. The legislative history of the 1949 Amendments to the Act (Pet. Sep. App., pp. 133-153) shows serious objections in both the House and Senate to the Administrators' definition; and each House adopted a different amendment to correct this situation. (Pet. Sep. App., p. 133; H. Rep. No. 1453, 81st Cong., 1st Sess., p. 29 (Conference Report on 1949 Amendments).) Although the conferees did not embody either of these amendments in the final bill, the legislative history as a whole refutes the argument that Congress was ratifying the Administrator's definition. And in any case, where, as here, the law is plain, failure to amend does not constitute adoption of an administrative definition which departs from the plain meaning of the statute. *Cf. Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47; *Helvering* v. *Hallock*, 309 U.S. 106, 119-120; *Brannan* v. *Stark*, 342 U.S. 451, 465. The statutory language and purpose are paramount. See *Addison* v. *Holly Hill Fruit Products*, 322 U.S. at 618; *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 64; *Jewell Ridge Coal Corporation* v. *Local 6167*, 325 U.S. 161, 169; *Hilton* v. *Sullivan*, 334 U.S. 323, 338-339. Nor can Petitioner derive any comfort from Section 12 of the Portal to Portal Act of 1947, 29 U.S.C. 251, 261 (Pet. Br., p. 35). As Petitioner states, that section of the Portal Act simply provided exemption from liability that might have been incurred by retroactive application of the "area of production" definition here involved.

4. *The legislative history of Section 13(a)(10)* [45] *shows*

[45] Here again, as in the discussion of the Section 13(a)(6) legislative history, the bills in their various forms referred to in this

also that the population limitation in the "area of production" definition is invalid as here applied.

(a). *Senate Proceedings.*

We have already pointed out, *supra*, p. 30, that S. 2475, which ultimately became the Fair Labor Standards Act of 1938, was introduced in the Senate on May 24, 1937. Neither as introduced nor as reported by the Senate Committee on Education and Labor was there any provision comparable to Section 13(a)(10). S. 2475, as reported in the Senate on July 6, 1937, Calendar No. 905, 75th Cong., 1st Sess.

In debate on the floor of the Senate, Senator Copeland suggested that the exemption for agricultural workers should be extended to include "preparing for market, in their raw or natural state within the area of production, fresh fruits and vegetables, including packing, packaging, storing, transporting, and marketing of said commodities". 81 Cong. Rec. 7656.

Later, Senator Schwellenbach, to whom this Court has referred as "one of the most ardent advocates of equalization in the status of large and small farmers" under the Act (*see Waialua*, 349 U.S. at 268), offered the following amendment:

> "The term 'person employed in agriculture,' as used in this Act, insofar as it shall refer to fresh fruits or vegetables, shall include persons employed within the area of production engaged in preparing, packing, or storing such fresh fruits or vegetables in their raw or natural state." 81 Cong. Rec. 7876.

Since the bill already exempted "persons employed in agriculture", the effect of the amendment was to extend

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discussion of the Section 13(a)(10) legislative history are collected in "Senate Bills, 75th Cong. 1937-38, Vol. 13, 2401-2550, J-50-2d Set" (Library of Congress). See note 15, p. 30, *supra*.

the exemption to the additional persons embraced in the amendment.

Senator Schwellenbach explained that the purpose of his amendment was to "make it possible for the small fruit and vegetable producer [who does not have his own processing equipment] to operate upon the same basis as the large fruit and vegetable producer [who does have his own processing equipment and is exempt under the agriculture exemption]". 81 Cong. Rec. 7876. He further explained that the farmer bears the cost of the work and therefore no higher costs should be imposed upon the plants preparing the farmer's crop for market. *Id.*, 7877.

Senator Connally asked whether the largest apple-packing plant in the world, located at Winchester, Virginia, right in the heart of a great apple-producing region, would be exempt. Senator Schwellenbach replied that "if the work done in that plant is as described in the amendment, it would be exempt". *Id.*

Senator Schwellenbach's amendment was adopted (81 Cong. Rec. 7949) and the bill passed by the Senate on July 31, 1937, contained that amendment. 81 Cong. Rec. 7957.

The purposes of the amendment, as stated by Senator Schwellenbach, *i.e.*, to equalize the status of the large and small farmers under the Act so that each could have their products processed for market by employees exempt from the Act and to spare the farmer additional costs, can only be served if the exemption applies notwithstanding the processing plant is located in a town of over 2500 population. And in any event, as already noted, Senator Schwellenbach recognized that the world's largest apple-packing plant would be exempt, even though located in Winchester, Virginia, a city with a population of over 10,000 according to the 1930 U.S. Census and

over 12,000 according to the 1940 U.S. Census. So too a town like Quincy with a population of only some 6500 may not be excluded from the "area of production" simply because of its size.

Pertinent portions of the debates in the Senate on the "area of production" exemption are set forth in Appendix E, pp. 111-113, *infra*.

(b). *House Proceedings.*

The bill after passage in the Senate went to the House and was referred to the House Committee on Labor. As reported by that Committee on August 6, 1937, the bill contained the Schwellenbach amendment as passed in the Senate. *Sec. 3(a)(20), S. 2475 as reported*, Union Calendar No. 535, 75th Cong., 1st Sess., p. 8; H. Rept. 1452, 75th Cong., 1st Sess., p. 12.

As previously stated, *supra*, p. 37, the Rules Committee of the House refused to grant a rule, but on December 13, 1937, that Committee was discharged from further consideration of the bill by petition of the House membership. On the floor of the House, amendments offered by Congressmain Lea and Lucas were adopted, which extended the Schwellenbach amendment to all "agricultural commodities" "in their raw or natural state". 82 Cong. Rec. 1783-1784. The debates on such amendments are set forth in Appendix E, pp. 113-115, *infra*. But then on December 17, 1937, the bill was recommitted to the Labor Committee.

On April 21, 1938, another draft of S. 2475 was reported to the House. That draft exempted "any employee employed in agriculture" and also defined "employee employed in agriculture" as including

> ". . . individuals employed within the area of production, engaged in storing for the farmer, preparing (but not commercial processing), or packing agricultural or horticultural commodities in their raw

natural or dried state, but does not include employees of transportation contractors engaged in transportation of farm products from farm to market". *Sec. 3(g), S. 2475*, 75th Cong., 3d Sess., reported with amendment, Union Calendar No. 804, p. 50; H. Rept. 2182, 75th Cong., 3d Sess., pp. 2, 8.

This bill thus not only incorporated the Schwellenbach amendment, as broadened by the Lea-Lucas amendments to cover all "agricultural commodities" and not simply "fresh fruits or vegetables", but it also extended the exemption to such commodities in their "dried" state as well as in their "raw or natural state".

In floor debate Congressman Biermann introduced an amendment, substituting for Sec. 3(g) the following:

> "'Employees engaged in agriculture' includes individuals employed within the area of production, engaged in the handling, packing, storing, ginning, compressing, pasteurizing, drying, or canning of farm products and in making cheese and butter." 83 Cong. Rec. 7401.

Congressman Biermann explained that his amendment was not intended to exempt factories (83 Cong. Rec. 7401) and included only the "first processing of things that come off the farm" (*Id.*) He added that "the important point is that the farmer pays the bill for this processing" (*Id.*).

The Biermann amendment was adopted (83 Cong. Rec. 7407-7408) and the bill passed the House on May 24, 1938, containing such amendment. 83 Cong. Rec. 7449-7450.

Pertinent portions of the debates on the Biermann amendment are set forth in Appendix E, pp. 115-119, *infra*.

(c). *Conference Report.*

The Conference Report retained the Biermann Amendment but made the following changes in it: (a) the amend-

ment was transferred from the definitions section of the bill to the exemptions section; (b) the Administrator was given authority to define "area of production"; and (c) the making of dairy products was included within the terms of the amendment. 83 Cong. Rec. 9249, 9255.

(d). *Conclusion on Legislative History.*

The debates in both Senate and House show clearly that it was the purpose of Congress to protect against increased costs the small farmer who did not have his own processing plant, and to equalize the status of large and small farmers under the Act. The debates also show that the Section 13(a)(10) exemption was clearly related to and forms an integral part of the agriculture exemption. *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 612-613. Also, as stated by Mr. Justice Rutledge, dissenting in the *Holly Hill* case, the operations exempted by Section 13(a)(10) consist of the first stages of preparation for market. 322 U.S. at 626. Surely the purpose of Section 13 (a) (10) cannot be served if nearby plants preparing the farmer's crops for market are excluded from the exemption just because they are located in small rural communities such as Quincy, with a population exceeding 2500.

This Court stated in the *Holly Hill* case (322 U.S. at 615):

> "Congressional purpose as manifested by text and context is not rendered doubtful by legislative history. Meagre as that is, it confirms what Congress has formally said. The only extrinsic light cast on Congressional purpose regarding 'area of production' is that cast by the sponsors of this provision *for enlarging the range of agricultural exemption*. Senator Schwellenbach frankly stated that the largest apple packing plant in the world would be exempt if the 'work done in that plant is as described in the amendment'. 81 Cong. Rec. 7877. And in the House, Representative Biermann, while explaining his-

amendment in somewhat Delphic terms, did indicate plainly enough that he had in mind not differences between establishments within the same territory but between rural communities and urban centers: 'may I say that all over this country it has been recognized that there should be a labor differential between the large city and the little town.' 83 Cong. Rec. 7401.[5]

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[5] Representative Bierman was asked whether his amendment 'would apply to a packing house located in Iowa and Illinois in the area of production, which employs two or three hundred men'. This was his complete answer: 'Speaking frankly, I think that is something that would have to be worked out. There are some packing houses in the State of Iowa that this amendment would apply to perhaps; but may I say that all over this country it has been recognized that there should be a labor differential between the large city and the little town.' *Certainly Mr. Biermann did not give the remotest intimation that 'area of production' was meant to convey any idea other than that which area usually conveys.*" [Emphasis supplied]

Obviously, an agricultural community, such as Quincy, Florida, is not an urban center in the above sense, regardless of how it may be classified for census, statistical or other purposes. As Congressman Biermann indicated, his reference to "large cities" meant places like Jersey City and New York City and not agricultural communities or little towns such as Quincy. See his statements appearing at 83 Cong. Rec. 7401, quoted *infra*, Appendix E, p. 117.

Since, as we have shown, the Administrator's definition of "area of production" is invalid as applied here in excluding Respondents' plants from such "area" simply because they are located in a town of over 2500 population, and since the Respondents' employees otherwise fall within the Section 13(a)(10) exemption, the Court of Appeals correctly ordered dismissed Petitioner's suits for injunction. As held by the court below (RK 95, RB 165), Peti-

tioner is not entitled to an injunction until he issues a valid definition of "area of production" excluding Respondents' plants. *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 619 is not to the contrary. There this Court, after invalidating the "area of production" definition, remanded the case to the District Court with instructions that it be held pending the adoption of a valid definition. But since that was a suit by employees for wage payments *for the past*, a dismissal of the suit might have been *res adjudicata*. On the other hand, Petitioner here is seeking injunctions against future violations of the Act and his right to such injunction depends upon the existence of a valid definition which excludes Respondents' plants. Absent such definition the suits for injunction should be dismissed.[46] Such dismissal will not be *res adjudicata* in any *future* injunction suits, if Respondents should not be exempt under any new valid regulation as to "area of production" and should fail to comply therewith.

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[46] *Walling* v. *McCracken County Peach Growers Ass'n.*, 50 F. Supp. 900, 905-906 (W.D. Ky.); *Messenger* v. *Traders Compress Co.*, 107 F. Supp. 354, 361 (E.D. Okla.) *rev'd. on other grounds sub nom. Tobin* v. *Traders Compress Company*, 199 F. (2d) 8 (C.C.A. 10). We do not understand Petitioner to contend to the contrary if the definition is invalid; his argument is that the "area of production" definition is valid.

III. IF THE COURT IS UNABLE ON THE PRESENT RECORD TO HOLD THE EXEMPTION OF SECTION 13(a)(6) APPLICABLE TO RESPONDENT KING EDWARD'S PACKING PLANT EMPLOYEES, OR TO HOLD THAT SUCH EMPLOYEES AND ALSO THE EMPLOYEES OF RESPONDENT BUDD PERFORM OPERATIONS ENUMERATED IN SECTION 13(a)(10), AND THAT THE AREA OF PRODUCTION DEFINITION IS INVALID, THE ACTIONS SHOULD BE REMANDED TO THE DISTRICT COURT FOR TRIAL OF THE ISSUES.

We have shown hereinabove that the facts in the Record clearly establish that the Court of Appeals correctly granted summary judgment to the Respondents. But if, contrary to our contention, this Court regards the Record as inadequate for that purpose, it should simply remand the actions to the District Court and order a full trial of the issues.

As pointed out, *supra* p. 11, early in the litigation Respondent King Edward filed a motion for summary judgment (RK 6) which the District Court denied (RK 37). The reason given by the court for its action was that "the factual questions presented by the pleadings are such that this case may not appropriately or safely be disposed of on motion for summary judgment" (RK 36). Yet subsequently the court itself suggested that all parties file motions for summary judgment (RK 86, 57), even though the Record discloses nothing that had occurred in the meantime, which rendered the case any more "appropriate" or "safe" for disposition on motion for summary judgment.[47]

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[47] In its opinion, granting Petitioner's motion for summary judgment, the District Court, referring to the earlier denial of King Edward's motion, stated

> "Because of collateral factual issues raised by plaintiff in this case, which the plaintiff was unwilling to waive at that

In opposing King Edwards' earlier motion for summary judgment, Petitioner filed a Response urging that there are "serious and genuine disputes as to many material facts which can only be resolved by a full and complete trial of the issues", and listing some of such questions as being whether King Edward is a "farmer" within the meaning of Section 3(f); whether its packing plant operations are incident to and in conjunction with its farming operations within the meaning of that section; whether its packing plant employees perform operations enumerated in Section 13(a)(10); and whether the Administrator's definition of "area of production" is arbitrary and capricious in containing a population limitation (RK 12, 11). In two briefs filed with the District Court in support of this Response, Petitioner argued strenuously that these questions could be resolved only after full presentation of all material facts bearing upon them. And his briefs were replete with citation of authorities as to the narrow limits within which motions for summary judgment are to be granted.

If Petitioner's thesis is accepted, then the pleadings and affidavits in the Record, upon which his motion for summary judgment was granted, were insufficient to permit a decision on whether in fact the employees here involved are exempt under Section 13(a)(6) or Section 13(a)(10). In that situation it was as wrong for the District Court to deny the exemptions as to allow them. Yet by granting Petitioner's motion for summary judgment, the District Court did in fact deny the exemptions. The proper course was to withhold judgment until after full trial of the issues at which all pertinent facts could be adduced.

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time, the Court was compelled to and did deny defendant's motion for summary judgment" (RK 57).

Neither the District Court's opinion nor the Record discloses what such collateral factual issues were, or, whatever they were, that they did not exist as much when the Court granted Petitioner's motion for summary judgment as when it denied King Edward's earlier motion.

The summary judgment procedure, authorized by Rule 56 of the Federal Rules of Civil Procedure, is to be exercised only where no genuine issue of fact exists. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627; *Loew's Inc.* v. *Bays*, 209 F. (2d) 610, 614-615 (C.C.A. 5); *Williamson* v. *T.S.C. Motor Frt.*, 203 F. (2d) 257, 258 (C.C.A. 5); *Arnstein* v. *Porter*, 154 F. (2d) 464, 468 (C.C.A. 2); *Rogers* v. *Girard Trust Co.*, 159 F. (2d) 239, 241 (C.C.A. 6); *Arrick* v. *Rockmont Envelope Co.*, 155 F. (2d) 568, 571 (C.C.A. 10). This is as true in suits arising under the Fair Labor Standards Act as in any other type of suit, whether for injunction (*Walling* v. *Fairmont Creamery Co.*, 139 F. (2d) 318, 322 (C.C.A. 8); *Walling* v. *Reid*, 139 F. (2d) 323, 326 (C.C.A. 8)), or for back pay (*Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-257; *Bozant* v. *Bank of New York*, 156 F. (2d) 787, 790 (C.C.A. 2)).

The authorities are also clear that where there is judgment for the plaintiff on the pleadings, the case should be treated as if the facts well pleaded in the answer were established. *National Metropolitan Bank* v. *U.S.*, 323 U.S. 454, 456-457; *Purity Cheese Co.* v. *Ryser*, 153 F. (2d) 88, 89 (C.C.A. 7) and cases there cited. The pleadings, affidavits, etc. should be liberally construed in favor of the party against whom the summary judgment is sought: *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F. (2d) 879, 881 (C.C.A. 7), *cert. den.* 347 U.S. 1013; *Dulansky* v. *Iowa-Illinois Gas and Electric Co.*, 191 F. (2d) 881, 884 (C.C.A. 8).

Petitioner has in effect conceded (RK 12) that the allegations in Respondent King Edwards' answer and affidavits (RK 3-11, 35, 48-53) raise sufficient question as to the application of the exemptions here involved to King Edward's packing plant employees so that King Edward is entitled at least to a full trial of the issues.[*] The same is

[*] King Edward is not foreclosed from making this argument because it too filed a motion for summary judgment at the same time.

true as to the allegations in Respondent Budd's answer (RB 32 *et seq.*) and the admissions of Petitioner (RB 48-52, 56-57) and of Respondent Budd (RB 141-142) in that case.

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as Petitioner. King Edward filed such motion only at the insistence of the District Court (RK 57, 86). And in any event the fact that both parties have moved for summary judgment does not indicate that there is no issue of material fact. *Garrett Biblical Institute* v. *American University*, 163 F. (2d) 265, 266 (App. D.C.). By moving for summary judgment a party concedes only that no genuine issue of facts exists for the purpose of his motion, but this does not carry over and constitute such concession as to the other party's motion for summary judgment. *Walling* v. *Richmond Screw Anchor Co.*, 154 F. (2d) 786, 784 (C.C.A. 2), *cert. den.* 328 U.S. 870 (This case was very much like the instant one in that it involved a suit for injunction brought by the Administrator under the Act, with both parties moving for summary judgment); *Begnaud* v. *White*, 170 F. (2d) 323, 327 (C.C.A. 6); *F.A.R. Liquidating Corp.* v. *Brownell*, 209 F. (2d) 375, 380 (C.C.A. 3).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed. In the alternative, if the Court finds it inappropriate to affirm the summary judgments directed by the Court of Appeals, the actions should be remanded to the District Court with instructions to proceed to trial of the issues.

Respectfully submitted,

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APPENDIX A

Statutes and Regulations

1. *Statutory Provisions Involved.*

Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U.S.C. §201):

Section 13(a)(6) exempts from both the wage and hour provisions of the Act "any employee employed in agriculture . . ." Section 3(f) defines "agriculture" to include—

> ". . . farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

Section 7(c) provides as follows:

> "In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugar cane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural com-

modity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged."

Section 13(a)(10) exempts from both the wage and hour provisions of the Act

> "any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products";

2. *Administrator's Regulations, Part 536, Defining "Area of Production."*

In Regulations, Part 536, 29 Code of Fed. Regs., Ch. V, Section 536.2, WHM 35:52-53, the Administrator has defined "area of production" as used in Section 13(a)(10). Such definition follows: -

"SECTION 536.2—"AREA OF PRODUCTION" AS USED IN SECTION 13(a)(10) OF THE FAIR LABOR STANDARDS ACT

(a) An individual shall be regarded as employed in the "area of production" within the meaning of Section 13(a)(10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(1) If the establishment where he is employed is located in the open country or in a rural community and 95 percent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following air line distances from the establishment:

(i) with respect to the ginning of cotton—10 miles;

(ii) with respect to operations on fresh fruits and vegetables—15 miles;

(iii) with respect to the storing of cotton and any operations on commodities not otherwise specified in this subsection—20 miles;

(iv) with respect to the compressing and compress-warehousing of cotton, and operations on *tobacco*, grain, soybeans, poultry or eggs—50 miles.

(b) for the purposes of this regulation;

(1) "Open country or rural community" shall not include any city, town or urban place of 2,500 or greater population or any area within

(i) one air line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000 or

(ii) three air line miles of any city, town or urban place with a population of 50,000 up to but not including 500,000, or

(iii) five air line miles of any city, with a population of 500,000 or greater

according to the latest available United States Census.

(2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95 percent of the commodities are received from normal rural sources of supply shall be the last preceding calendar

month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable." [Emphasis supplied.]

APPENDIX B

Legislative History of Sections 13(a)(6) and 3(f)

1. *Debate on Senator McGill's amendment to provide that the agriculture exemption should apply (1) to practices performed on a farm as an incident to farming operations and (2) to "delivery to market."*

"Mr. McGill. Mr. President, the purpose of the amendment is to broaden the definition of 'employee' as applied to agriculture. I can readily see how some have construed the language of the bill to mean that one who operates a thrashing [sic] machine outfit and employs a crew and is employed by a farmer to thrash [sic] his wheat might be included under the provisions of the bill. Likewise, those who are engaged in harvesting and delivering to market might be included. It is my understanding, although no definite commitment has been made, that the amendment is not opposed by those in charge of the bill. If I am correct, I should like to have the amendment agreed to.

* * * * *

"Mr. George. Is it the purpose of the amendment to exempt those who thresh grain?

"Mr. McGill. Those who thresh grain, who harvest grain and deliver it to market.

"Mr. George. Would the amendment also apply to the harvesting of any other crop?

"Mr. McGill. It would apply to any commodity produced on a farm.

"Mr. George. Would it apply to peanut pickers who pick in the fields?

"Mr. McGill. Yes.

"Mr. George. And who move peanuts to the market?

"Mr. McGill. Yes; that it my understanding.

"Mr. George. I should like to ask the Senator from Alabáma if that is his interpretation of the amendment.

"Mr. Black. That is my interpretation of the amendment, and it is my belief that the bill as originally drawn covers what is now contained in the language of the amendment, but some Senators who were doubtful about it wished to draw a clarifying amendment.

"Mr. George. I am sure it does not in fact do so, because the picking of peanuts and the harvesting of grain in my part of the country are done purely by contract with outsiders, who in a great many cases have no farm interest. What I want to get at is whether, in the opinion of the Senator from Alabama, the language of the amendment of the Senator from Kansas includes any field crop that is threshed, as in the case of grain, or picked, as in the case of peanuts in the field.

"Mr. Black. Unquestionably.

"Mr. McGill. I may say to the Senator from Georgia and other Senators that it is my object to make the language of the amendment broad enough to include all work done on a farm, *so long as it is incidental to agricultural purposes.*

"Mr. George. *And so long as it is merely preparatory and necessarily preparatory to the marketing of the field crop.* Is that true?

"Mr. McGill. *That is true; and the language would also include all labor performed in making delivery to market.*

"Mr. George. I thank the Senator.

"Mr. Copeland. Of course, that would take care

of my apple man, about whom I have been worrying. Would it not? *It would take care of the farmer who takes his crop of apples to the market, wouldn't it not?*

"Mr. McGill. That is correct." [Emphasis supplied.] 81 Cong. Rec. 7888.

2. *Debate on amendment proposed by Senator McAdoo.*

Senator McAdoo proposed an amendment, substituting for the language in the definition of agriculture relating to practices ordinarily performed in connection with farming operations, the following:

> "Any practices ordinarily performed by or for a farmer as an incident to such farming, including harvesting, packing, storing, or preparing for market, in the raw or natural state, any products derived from any of the above agricultural pursuits." 81 Cong. Rec. 7927.

The following discussion ensued:

"Mr. McGill. Yesterday afternoon the Senate amended the lines to which the Senator's amendment applies by inserting in line 13, after the word 'farmer,' the words 'or on a farm,' and also by inserting in line 14, after the word 'operations,' the words 'including delivery to market,' *it being the purpose of these amendments to exclude from the bill all labor performed on a farm*, whether by contract with the farmer or otherwise, and to *exclude all labor connected with the delivery to market of commodities produced on a farm*. . . .

". . . I will state that I feel the amendment adopted yesterday is broader than the amendment proposed by the Senator from California, by virtue of the fact that no limitation was placed in the amendment adopted yesterday, such as mentioning harvesting, packing, and operations of that character. *The amendment adopted yesterday was intended to include, and, I think, it does include, all kinds of labor performed on a farm and all kinds of labor in con-*

section with delivering agricultural products to market. In my judgment it includes more than does the amendment proposed by the Senator from Arizona and is broader in its terms. I hope that the amendment adopted yesterday will remain in the bill and that the amendment of the Senator from California, by virtue of the narrower terms carried in it, will be rejected.

"Mr. George. I suggest to the Senator from California that, in my opinion the amendment offered by the Senator from Kansas [Mr. McGill] yesterday is broader than his amendment, because it takes care of all operations, whether performed by cooperatives or by persons under contract or by persons who have merely been employed for a particular job. To enumerate even them in a succeeding clause, or to recite the things that are included, would thus, of course, under the well known rule of construction, form a limitation upon what is first stated as a broad general proposition. I think the Senator's purpose is absolutely accomplished by the amendment offered yesterday by the Senator from Kansas.

"I may say to the Senator from California that I had in mind precisely what he has in mind, but with reference to different products. After examining the amendment of the Senator from Kansas I concluded that it covered all those cases as well as the cases which I think the Senator himself has in mind" [Emphasis supplied]. *Id.*, pp. 7927, 7928-7929.

3. *Debate on Conference Report between Senator Thomas and Senator Johnson.*

"Mr. Johnson of California: *I take it from what the Senator has said that the agricultural exemptions are practically plenary, and take in almost all agricultural products.*

"Mr. Thomas of Utah. I could not hear part of the Senator's sentence.

"Mr. Johnson of California. *I said that, in general language, agriculture is exempted from the operation of the bill.*

"Mr. Thomas of Utah. *It is.*

"Mr. Johnson of California. *Does the Senator know of any particular kind of vegetables* that is included in the bill?

"Mr. Thomas of Utah. *I do not know of any. The definition seems to be all-inclusive, and we tried to make it so.*" [Emphasis supplied] 83 Cong. Rec. 9162-9163.

APPENDIX C

Administrator's Interpretations of Sections 13(a)(6) and 3(f)

1. *Interpretative Bulletin No. 11* (WHM 35:351-366).

"Practices . . . Performed by a Farmer"

"10. . . . It should be noted with respect to all of these practices that they must be performed by the farmer and his employees and that such practices must be incident to or in conjunction with the farming operations of the farmer. *It makes no difference whether they are performed on or off the farm if performed by a farmer.* . . . [Emphasis supplied]

"When a farmer is engaged in these practices on agricultural or horticultural commodities grown on other farms as well as his own, as for example, when he cans tomatoes which come both from his farm and from the farms of others, such operations do not seem to be incident to or in conjunction with his farming operations. In our opinion such operations assume the aspect of an independent business and do not fall within this exemption."

. . . . . .

"Preparation for Market (Performed by a Farmer)"

"(b) The term 'preparation for market' must be treated differently with respect to various commodities. The following activities, among others, when performed by a farmer, seem to be included within the term:

1. *Grain, seed, and forage crops.*—Weighing, hauling, stacking, cleaning, grading, shelling, sorting, packing, and storing.

2. *Fruits and vegetables.*—Assembling, hauling, ripening, cleaning, grading, sorting, drying, preserving, *pickling*, storing, and *canning*.

3. *Nuts (pecans, walnuts, peanuts, etc.).*—Grading, cracking, shelling, cleaning, sorting, packing, and storing, unshelled nuts; and performing the same operations except cracking and shelling, upon the nut meats.

4. *Sugar.*—*Manufacturing raw sugar*, cane, or maple syrup and molasses.

5. *Eggs.*—Handling, cooling, grading, and packing.

6. *Wool.*—Grading and packing.

7. *Dairy products.*—Salting, printing, wrapping, packing, and storing butter; ripening, molding, wrapping, packing, and storing cheese; and *canning or packing any other dairy product*.

8. *Cotton.*—Weighing, *ginning*, and storing cotton; hulling; delinting, cleaning, sacking, and storing cottonseed.

9. *Nursery stock.*—Handling, wrapping, packaging, and grading.

10. *Tobacco.*—*Handling, drying, bulking, stripping, tying, sorting, stemming, packing, and staying.*

11. *Livestock.*—Handling and loading.

12. *Poultry.*—Culling, grading, cooping, and loading.

13. *Honey.*—Assembling, extracting, heating, ripening, removing comb, straining, cleaning, grading, weighing, blending, packing, and storing.

14. *Fur.*—Removing the pelt, scraping, drying, putting on boards, and packing." [Emphasis supplied]

"Delivery to Storage (Performed by a Farmer)"

"(c) The term 'delivery to storage' includes taking the commodities, dairy products, livestock, bees or their honey, fur-bearing animals or their pelts, or poultry to the places where they are to be stored or held pending preparation for or delivery to market."

"Delivery . . . to Market (Performed by a Farmer)"

"(d) The term 'delivery . . . to market' includes taking the commodities, dairy products, livestock, bees or their honey, fur-bearing animals or their pelts, or poultry to market."

"Delivery . . . to Carriers for Transportation to Market (Performed by a Farmer)"

"(e) The term 'delivery . . . to carriers for transportation to market' includes taking the commodities, dairy products, livestock, bees or their honey, fur-bearing animals or their pelts, and poultry to a carrier—truck, railroad, skip, etc.—for transportation by such carrier to market."

"Other Practices (Performed by a Farmer)"

"(f) Besides the practices listed in the statute as being incident to or in conjunction with farming operations, there are other practices included within the exemption.

"The actual selling of the agricultural or horticultural commodities, etc., is such a practice. The truck drivers working for a farmer, who haul garbage and feed to the farm for feeding pigs, also perform practices that are exempt. If a company has sugarcane fields and also a mill, the transportation of its own sugarcane to the mill seems an incidental practice which is included in this term.

"It must be emphasized with respect to all practices performed by a farmer, for which a claim is made that they are incident to or in conjunction with his farming operations, that they must be performed *only* on the agricultural or horticultural commodities, dairy products, livestock, bees, fur-bearing animals, or poultry produced or raised by him. The same

limitation applies with respect to the practices discussed in paragraph 11, below."

"Practices . . . Performed . . . on a Farm"

"11. The term 'practices (including any forestry or lumbering operations) *performed . . . on a farm* as an incident to or in conjunction with' farming operations, involves substantially the same inquiries as those discussed in paragraph 10.

"It should be observed, however, that since these practices must be performed *on a farm*, one of the activities listed in the statute, namely, delivery to market, cannot normally be one of the included practices, for that involves working off the farm. Hence, employees of independent contractors engaged in transporting to market agricultural or horticultural commodities, dairy products, poultry, livestock, bees or their honey, and fur-bearing animals or their pelts, would not be exempt. With that exception, practices described in paragraph 10, even if performed by employees of someone other than the farmer, are excluded from the wage and hour coverage of the act, so long as they are performed on the farm and 'as an incident to or in conjunction with such farming operations.'

"Thus, if an independent contractor threshes wheat on a farm, his employees are not subject to the wage and hour provisions of the act while they are so engaged on the farm where the wheat is grown. So, too, employees of an independent contractor who inspect and cull flocks of poultry on a farm are exempt while they are working on the farm where such poultry is raised. Similarly, employees erecting a silo on a farm are exempt while they are working on such farm." [Emphasis supplied]

"Office Workers, Etc."

"12. We have received inquiries concerning office help — secretaries, clerks, bookkeepers, etc. — night watchmen, maintenance workers, engineers, etc., who are employed by a farmer or on a farm in connection with the activities described in the definition of 'agriculture' contained in section 3(f). In our opinion such employees are exempt."

2. *Other Administrative Interpretations*

The Department of Labor in various opinion letters and releases has held the following to come within the agriculture exemption:

(a) Handling of tobacco in a warehouse by a farmer who grows the tobacco, including drying, redrying, and further processing the tobacco. Quotations from the opinion of the Solicitor of Labor follow:

> "ANSWER (SOLICITOR OF LABOR): You ask whether the handling of the broad leaf and shade grown tobaccos, including all of the operations in the warehouse, comes within the Section 13(a)(6) exemption. This exemption may under proper circumstances apply to the operations performed on the tobacco by the growers provided that these operations are 'performed by a farmer or on a farm as an incident to or in conjunction with such farming operations.' It appears that the companies are engaged in the growing of tobacco. The operations to which you refer may under proper circumstances be incidental to or in conjunction with the farming operations performed by them or on their farms. You are correct in your assumption that in any weeks in which one of the companies is engaged in operations on tobacco other than that grown on its own farms, the Section 13(a)(6) exemption will be defeated. . . . The Section 13(a)(6) exemption is not limited to the first drying of a commodity but may also apply to redrying. Nor is this exemption limited to 'first processing' operations. Under proper circumstances it may apply to further processing of agricultural commodities if the tests set forth in paragraphs 10 and 11 of Interpretative Bulletin No. 14 are met." WHM 35:752-753.

(b) "Where tobacco stemming is done by farmer or on farm, employees engaged in such work would appear to be exempt" under Section 13(a)(6). 3 CCH Labor Law Reporter, ¶25,242.344.

(c) Employees of an alfalfa grower, who haul the al-

falfa grown by the grower to a processing plant located off the farm. *WHM* 35:754.

(d) The removal of stumps by employees of an independent contractor from cut over timber land owned by a lumber company and now devoted by the lumber company to the growing of tung trees, where such removal and the plowing and fertilizing of the ground around the tung trees were necessary to the proper growth of the trees. *WHM* 35:751-752.

(e) Work on the farm by field men of a cannery to which the farmer had contracted to sell his crops, notwithstanding such field men from time to time report to the canning plant. 3 *C. C. H. Labor Law Reporter* ¶ 25,242.203.

(f) Pre-cooling operations on the farm with respect to fruits and vegetables grown on the farm. 3 *C. C. H. Labor Law Reporter* ¶ 25,242.21.

(g) Logging operations performed by the farmer or on his farm with respect to timber blown down in a hurricane. 3 *C. C. H. Labor Law Reporter* ¶ 25,242.252.

(h) Vining of peas grown on a farm by a vinery located thereon. 3 *C. C. H. Labor Law Reporter* ¶ 25,242.281.

(i) Packing by one who leases a farm of the crops he grows on that farm. *WHM* 35:751. The full text of this opinion follows:

"Question: Does the exemption provided in Section 13(a)(6) of the Act for employees engaged in agriculture apply in either of the following circumstances:

(1) A packing house operator leases a farm and packs the fruit grown on that farm. . . .

"Answer (Administrator): (1) If in fact the case you present is one where an individual leases land and then proceeds to operate the land as his farm, planting, growing and harvesting crops, we believe

that in packing such crops and only such crops the exemption provided by Section 13(a)(6) of the act for employees employed in agriculture would apply to him. We base this opinion upon the assumption that there is an actual bona fide lease of the farm by the individual in question."

APPENDIX D

Administrator's Interpretations of Certain Terms Used in Section 13(a)(10)

1. *Interpretative Bulletin No. 14.*

In Interpretative Bulletin No. 14, WHM 35:351, 363, 364, issued August 1939 and still outstanding, the Administrator interpreted the terms "handling", "packing", "storing", and "drying" as used in Sec. 13(a)(10). Such interpretations are as follows, in relevant part:

"Handling"

"26. The operations included in this term appear to be those physical operations customarily performed in obtaining agricultural or horticultural commodities from producers' farms; transporting them to and receiving them at the establishment, weighing them or otherwise determining on what basis the producer is to be paid, placing them in the establishment where further operations are to be performed, and delivering the commodities to warehouses. Specifically, these operations include loading the commodities on trucks, wagons, etc., in producers' fields or at concentration points, transporting them to the establishment, receiving and unloading them at the establishment, counting or weighing the commodities, assembling, binning, piling, or stacking them in the establishment; moving them from one place to another in the establishment, moving the bags, boxes, cases, barrels, bales, coops, and other loaded containers to wagons, trucks, railroad cars or other conveyances, and transporting the commodities away from the es-

establishment. Since it makes no difference that the employer does not own the goods being handled, the employees of brokers or commission houses who physically handle the goods may be within the exemption."

"Packing"

"27. Included in this term are those operations involved in placing agricultural or horticultural commodities in containers, and also the operations necessary to close or fasten such containers. Examples of specific activities, which are included in this term, are the sacking or bagging of unshelled pecans or other unshelled nuts, the sacking of grain, and the placing of fresh fruits and vegetables in crates. . . .

"Storing"

"28. Operations which appear to be included in this term are those involved in (1) placing agricultural or horticultural commodities in storage rooms or other places where the commodities are to be held prior to further preparation, sale or shipment; (2) taking care of the commodities while they are being so held; and (3) removing them from the storage rooms and transferring them to wagons, trucks, railroad cars, or other conveyances. . . ."

"Drying"

"32. The operations included in this term appear to be those performed on agricultural or horticultural commodities in order to remove or lower their moisture content. Such operations may be performed by natural methods or by exposure to heat from ovens, furnaces, etc. Typically, these operations are performed on fruits, vegetables, hay, and tobacco. The term does not include drying operations which take place on commodities that have ceased to be agricultural commodities within the meaning of Section 13 (a)(10) because their natural form has previously been changed. Thus, the drying of eggs that have been broken and separated and the drying of tobacco that has been stemmed are not included within the exemption."

2. *Administrator's Release M-12.*

In his release M-12, issued in February, 1947, WHM 35:63-64, the Administrator described the operations upon tobacco which are enumerated in Section 13(a)(10). The description follows:

"If your employees are engaged within the area of production in the handling, packing, drying, or stripping of tobacco for market they are exempt from both the minimum wage and overtime provisions. The "for market" requirement applies to each of the specified operations. Thus, employees of a cigar manufacturer who are handling tobacco for use by their employer in the manufacture of cigars are not exempt because they are not handling tobacco "for market."

To aid employers in judging whether their employees' activities are within these specific operations, the following interpretations are offered:

"Handling" includes those physical operations customarily performed in obtaining tobacco, transporting it to and receiving it at the establishment, weighing it, placing the tobacco in the establishment, and delivering it to warehouses or to transportation facilities.

"Packing" includes operations involved in placing tobacco in containers, and closing or fastening the containers.

"Drying" may be performed by natural methods or by exposure to heat from ovens, furnaces, etc.

"Stripping" includes the pulling of tobacco leaves from the stalk, tying the tobacco leaves into hands, grading and sorting."

APPENDIX E

Legislative History of Section 13(a)(10)

1. *Debates on Senator Schwellenbach's "area of production" amendment which was adopted in the Senate.*

Senator Schwellenbach's amendment read

> "The term 'person employed in agriculture,' as used in this Act, insofar as it shall refer to fresh fruits or vegetables, shall include persons employed within the area of production engaged in preparing, packing, or storing such fresh fruits or vegetables in their raw or natural state." 81 Cong. Rec. 7876.

The pertinent portions of the debate on such amendment follow:

> "Mr. Schwellenbach. . . . The picking of the apples is an agricultural process. If the man does it on his own ranch, the storing of the apples and the washing of the apples and the packing of the apples are all agricultural processes. If we leave the bill the way it now stands, it is going to mean that the large producer on the large ranch who can afford to maintain the equipment on his own ranch is going to have an unfair advantage over the small man who has only 5 or 10 acres, and who has to send his crop to a central warehouse, or who may join with others in a cooperative warehouse, and there have the same processes performed." 81 Cong. Rec. 7659. . . .

> "But it seems that, so long as they remain in their natural state and all of the work that is done upon them is the ordinary agricultural operation up to the point of processing, whether they are handled on the farm or by a group of men gathered together in a cooperative, or turned over to a central warehouse, *they should be exempt, because of the fact that if we do not exempt them, we are giving the large producer a very distinct advantage over the small producer, and I am certain it is not the purpose of the bill and is not within the economic theory of the bill to give*

the large producer an advantage over the small producer." [Emphasis supplied]. 81 Cong. Rec. 7660.

Mr. Schwellenbach. The amendment is very strictly drawn in an effort to limit the operations defined therein purely to those of an agricultural nature . . . In other words, in a small apple operation of 5 or 10 or 15 or 20 acres, it is not possible for the owner of the ranch to purchase and maintain on the ranch the necessary machinery which is required in the washing operation under the rules and regulations of the Department of Agriculture. It is not possible for him to provide on his ranch the necessary storage space to store the apples until such time as it is possible to take them to market. It is not possible on the small ranch to supply the space for packing the apples. Therefore, it is necessary for such a farmer either to join other farmers in a cooperative, or to send his apples to a packing house, and have these operations, which are purely agricultural operations, performed elsewhere than at the situs of the ranch or the farm.

"*The purpose of this amendment is to give protection against that situation, and to make it possible for the small fruit and vegetable producer to operate upon the same basis as the large fruit and vegetable producer.*" (Emphasis supplied). 81 Cong. Rec. 7876. . . .

"In other words, the small producer cannot afford to have the capital investment in the warehouse, the washing machinery, all of the necessary incidentals to this operation, while the larger producer can afford them, and he is exempt from the provisions of the bill." 81 Cong. Rec. 7877. . . .

"*The purpose of the amendment is not for the protection of the packing plant or for the protection of the owners of the packing plant. The cost is paid by the producer. These packing plants just pass the cost back to the man who produces the apples. The farmer pays the bill. The purpose of the amendment is to permit the small farmer, who cannot afford to*

have his own warehouse and cannot afford to have his own washing machine, to be placed upon a par with the larger producers, who can afford to maintain their own warehouses and their own washing machines and their own equipment." [Emphasis supplied]. 81 Cong. Rec. 7877.

"Mr. Connally. Mr. President, I should like to ask the Senator from Washington a question. Would not the effect of his amendment be to exempt all industrial warehouses and packing plants in apple territory? There is no limit. The condition is that they are packing plants and if they are, they are exempt.

"Mr. Schwellenbach. If a packing plant is working upon fresh fruits or vegetables, in their raw or natural state, within the immediate production area, it would be exempt.

"Mr. Connally. *My understanding is that the largest apple-packing plant in the world is located at Winchester, Va., right in the heart of a great apple-producing region. That would be exempt, would it not?*

"Mr. Schwellenbach. *If the work done in that plant is as described in the amendment, it would be exempt.*" [Emphasis supplied.] 81 Cong. Rec. 7877.

2. *Debates in House on Lea-Lucas amendment, broadening Senator Schwellenbach's amendment, to cover all "agricultural commodities" and not only "fresh fruits and vegetables".*

The Lea-Lucas amendment read as follows:

"'Person employed in agriculture' shall include persons employed within the area of production engaged in preparing, packing, or storing agricultural commodities in the raw or natural state." 82 Cong. Rec. 1784.

The following debates took place:

"Mr. Lea. Mr. Chairman, Subsection (20) grants

an exemption to labor engaged in preparing, packing or storing fresh fruits and vegetables within the area of production. This amendment is necessary to give to the fruit industry, and agriculture generally, that exemption that has been promised and which is clearly within the purpose of the bill. The defect in Subsection (20), as it stands, is that it is confined to fresh fruits and vegetables and omits all other farm products equally entitled to the exemption. Part of the farmer's labor should not be in the bill and the same laborers exempted when performing other agricultural labor.

"Mr. Keller. Fresh or not fresh?

"Mr. Lea. Fresh or not fresh.

"Mr. Keller. That is what I am asking the gentleman.

"Mr. Lea. The section is confined to fresh fruits and vegetables and omits to give similar exemptions to all other products. Mr. Chairman, I am agreeable to the substitute of the gentleman from Illinois (Mr. Lucas), which would include agricultural commodities and relieve the section of the unfair discrimination it now contains.

"Mr. Keller. What does that mean?

"Mr. Lea. Ordinary agricultural commodities of the farm.

"Mr. Keller. What does the gentleman mean by that?

"Mr. Lea. The exemptions of this section are confined to preparing, storing, and packing in the area of production. . . .

"Mr. Lucas. . . . This amendment merely provides that a 'person employed in agriculture' shall include persons employed within the area of production engaged in preparing, packing, or storing agricultural commodities in the raw or natural state.

"It broadens the definition and will adequately protect the farmers of my section. It exempts agricul-

ture in all its branches and work incidental thereto, including the necessary handling and preparing for market commodities when performed by the farmer or by a farmer's owned and controlled cooperative. It should be understood that it applies only to the employees in the area to be determined by the Administrator where the commodity is produced. (Emphasis supplied). 82 Cong. Rec. 1783, 1784.

3. *Debates on Biermann amendment, the second paragraph of Section 13(a)(10).*

Mr. Biermann's amendment read as follows:

"'Employees engaged in agriculture' includes individuals employed within the area of production engaged in the handling, packing, storing, ginning, compressing, pasteurizing, drying, or canning of farm products and in making cheese and butter." 83 Cong. Rec. 7401.

Pertinent portions of the debates on such amendment follow:

"Mr. Biermann. . . . As Charles W. Holman, Secretary of the National Cooperative Milk Producers Federation, says: 'Persons employed in agricultural processing plants in country districts are well paid and are envied persons in their community. Farm labor, and, indeed, many farmers themselves would be happy to change places with those persons fortunate enough to be employed in creameries, cheese factories, and country milk plants'. . . . Nearly every large farm organization in the United States has endorsed this amendment. I know of none that opposes it. It is a well-known fact that most of the cost—in most cases all of it—of running these farm factories is taken out of the amount the farmer receives for his product. . . . Now why do we want farm factories exempted from the terms of this bill? Because they have to be conducted in most cases in a way very different than the way the big factory is run. . . . The employees in these farm factories are not complaining. They know the nature of their business requires elastic hours—and they know that the

rigid rules laid down in this bill would not work in the farm factories. We should not disrupt these little businesses, which are handling farm products direct from the farm and which are supplying good jobs to satisfied employees. . . . The amendment I have proposed would strengthen this bill without sanctioning substandard labor. It would save the farmers of America from an expense they should not be subject to. No good purpose would be served by including farm factories in this bill. Wage and hour legislation on a national scale is an experiment in America. Is it not wise to move cautiously? The bill is framed with big factory conditions in mind. Why include little farm factories, where labor conditions are good? The organized farmers of America ask that this amendment be adopted. Its adoption would not weaken the bill. The bill is aimed at substandard labor conditions. We ask you to exempt industries in which substandard labor conditions do not exist." 83 Cong. Rec. 7325, 7326. . . .

". . . .In an amendment I inserted in the Record yesterday I included the word 'processing'. I call attention to the fact that in the pending amendment this word is stricken out. I struck it out for the reason that some Members thought that *processing would include the making of cotton and wool into textiles, and rubber into finished products, and a long list of things of that kind.* The amendment I have offered *includes only the first processing of things that come off the farm. The important point is that the farmer pays the bill for this processing.* Those of us who come from dairy sections know that the cost of making butter fat into butter or milk into cheese is borne by the farmer. There is no contention about that, no argument. The members from the South will agree that the man who raises the cotton pays for ginning the cotton. *When the cost of making butter, when the cost of making cheese, when the cost of ginning cotton increases the farmer gets just so much less,* and our contention and the contention of the farm organizations is that the bill designed to help labor should not be so worded that it puts another burden on the agriculture of this country." (Emphasis supplied). 83 Cong. Rec. 7401. . . .

"Mr. Thompson of Illinois. May I ask the gentleman from Iowa whether his amendment would apply to a packing house located in Iowa and Illinois in the area of production, which employs 200 or 300 men?

"Mr. Biermann. Speaking frankly, I think that is something that would have to be worked out. There are some packing houses in the state of Iowa that this amendment would apply to, perhaps; but may I say that all over this country it has been recognized that there should be a labor differential between the large city and the little town." 83 Cong. Rec. 7401. . . .

"Mr. Biermann. . . . The question to be decided in voting on this amendment is whether or not the farms of the United States are going to have their definition of 'employee' as applied to agriculture or whether it is going to be written by people who have a city viewpoin . I do not find fault with the Committee on Labor, but I think whereas *they are the experts who have knowledge regarding the big factories in Jersey City, New York City, and some of the other large cities, by the same token, we who come from the farm areas are best qualified to say what terms should apply to labor in those areas.* I may say that not a single employee in any of these factories has made an objection to this, so far as I know."

"Mr. Whittington. It is simply to permit the farmer to get his material prepared for market. . . . [Emphasis Supplied] 83 Cong. Rec. 7401. . . .

"Mr. Biermann. I want to read a couple of sentences from a letter I received this morning from Edward A. O'Neal, president of the Farm Bureau Federation, in which he sets out the desirability of writing into this bill definitions such as proposed in my amendment. He states: 'We believe the bill should be clarified so as to assure the exemption of employees in such agriculture and horticulture industries in rural areas.' That is all my amendment takes in. He states further, as follows: 'Failure to exempt these operations when performed in rural areas

where conditions are so greatly different from the situation in large industrial and urban centers, will result in increased costs of processing and handling these products which will be reflected back in lower prices paid to farmers". 83 Cong. Rec. 7402. . . .

"Mr. Reilly. Does the gentleman's amendment cover a pea-canning set-up that is situated away from the farm on which the peas are grown?

"Mr. Biermann. In a little town?

"Mr. Reilly. In a little town; yes.

"Mr. Biermann. But in the farm area?

"Mr. Reilly. Yes.

"Mr. Biermann. Yes; it does. 83 Cong. Rec. 7402. . . .

"Mr. Wadsworth. . . . Let us look for a moment at the business of canning in a country canning factory. . . . If that country canning factory is not exempt from the provisions of this bill, then all of its wage-and-hour limitations will be placed upon it, as well as the overtime provision, and when you increase the cost of processing fresh vegetables, you must expect one of two results. First, the factory must raise its price to the consumer—and I happen to know that they run on an exceedingly narrow margin—or else reduce the price paid to the farmer, and that is always what is done. Whenever you increase arbitrarily the cost of processing these fresh vegetables the farmer gets less per ton for them. I have been through it myself. 83 Cong. Rec. 7403. . . .

"Mr. Gilchrist. . . . The amendment provides that out in the open country, where the handling, packing, or storing of agricultural commodities is done, there shall be certain exemptions from the provisions of the bill. We should have such exemptions so as to apply them to our creameries and milk producers and cheese makers. Do not destroy these farm activities. There is no question of health involved in what is done out in the open country, because the conditions there are healthful. The tempo of work

out there is slower than in the cities (83 Cong. Rec. 7405). . . . "There is no question involved as to the necessity for this amendment in the cities, and I would like to be for the bill if I can be. I deny the insinuation the gentleman from the city of Brooklyn made that we are trying to sabotage this bill. That gentleman has no interest in farms or farming. As was said by another, 'There has not been a calf born in his district for 50 years.' It is not the purpose to sabotage the bill, but if we do support the bill, it will be because it does not destroy our industries. The old bill provided for the things contained in this amendment. Why the change? The present bill takes care of the packing of apples, peaches, and pears, but it does not provide for such things as the canning of corn, the canning of tomatoes, or any of the other industries that the little villages depend upon and must depend upon. You folks are going to deny them that right if you vote down this amendment." 83 Cong. Rec. 7405-7406. . . .